No. 04-1265

# In The Supreme Court of the United States

HANY AL HEDAITHY and RIYADH AL-AIBAN,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED FOR REVIEW

1. Does the federal mail fraud statute, which criminalizes schemes "for obtaining money or property by means of false or fraudulent pretenses . . . ," encompass a scheme in which the defendant is alleged to have interfered with the victim's confidential business information, but is not alleged to have "obtained" money or property from the victim?

2. Can misrepresentations on an application to take a standardized academic test administered by a private company constitute mail fraud, even though *Cleveland v. United States*, 531 U.S. 12 (2000) holds that such misrepresentations would not constitute mail fraud were the test administered by a government entity?

## PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below were the United States and the named petitioners.

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## PETITION FOR WRIT OF CERTIORARI

Hany Al Hedaithy and Riyadh Al-Aiban respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in these matters on December 16, 2004.

## CITATIONS OF OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Third Circuit affirming the judgments of conviction of Petitioners Al Hedaithy and Al-Aiban is reported at 392 F.3d 580 (App. 1). The unreported oral opinion of the district court denying petitioner Al Hedaithy's motion to dismiss the superseding indictment is attached to this petition (App. 58).

## BASIS FOR JURISDICTION

The United States Court of Appeals for the Third Circuit entered its judgment on December 16, 2004. Jurisdiction arises under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 1341 of Title 18 of the United States Code provides in relevant part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . places

> in any post office . . . any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined under this title or imprisoned not more than twenty years, or both.

## STATEMENT

As this Court has warned, the mail fraud statute, 18 U.S.C. § 1341, can be a dangerous legislative tool when wielded irresponsibly by federal prosecutors and interpreted expansively by the courts. *See, e.g., Cleveland v. United States*, 531 U.S. 12, 24-26 (2000); *see also* Hon. Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945, 956-57 (1993) (observing that the mail fraud statute has been expanded as "courts acceded to the desire of prosecutors for the creation of amorphous crimes that would allow prosecutors to pursue hard-to-define improprieties or conduct that was improper only in the eyes of the particular prosecutor or to pressure individuals thought to possess knowledge of other criminal activities"); John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White Collar Crime*, 21 Am. Crim. L. Rev. 1, 3 (1983) (warning that the mail fraud statute "seems destined to provide the federal prosecutor with what Archimedes long sought – a simple fulcrum from which one can move the world"). The decision issued by the United States Court of Appeals for the Third Circuit in this matter illustrates this recurring problem: it uses the mail fraud statute to transform cheating on a standardized test into a federal crime. This case thus offers the Supreme Court an opportunity to impose a clear and much-needed limit on the reach of the federal

mail fraud statute and, in doing so, to resolve a circuit split regarding the scope of federal criminal jurisdiction.

## A. Factual and Procedural Background

Petitioners Hany Al Hedaithy and Riyadh Al-Aiban are two of approximately sixty Arab or Middle Eastern students who, in May 2002, were charged in the District of New Jersey with paying another to take the Test of English as a Foreign Language ("TOEFL") for them. The TOEFL exam is administered by the Educational Testing Service ("ETS"), a private company. Although the Department of Justice initially trumpeted these indictments as victories in the "war on terrorism," the government subsequently conceded that no TOEFL defendant was involved in any sort of terrorist activity. Rather, the only crime the defendants were charged with having committed was cheating on a standardized test.

Petitioners Al Hedaithy and Al-Aiban were initially charged in separate indictments filed on May 9, 2002. The indictments alleged that cheating on a test violates the mail fraud statute, 18 U.S.C. § 1341, because the defendants deprived ETS of its "property interest in maintaining the integrity of its testing process." Their cases were assigned to the Honorable Joseph E. Irenas, U.S.D.J., and the Honorable Joseph A. Greenaway, Jr., U.S.D.J., respectfully.

On September 23, 2002, the Honorable Stephen M. Orlofsky, U.S.D.J., dismissed a substantially identical TOEFL indictment for failing to allege that ETS was deprived of any money or a traditionally recognized form of property as required under the mail fraud statute. *See United States v. Alkaabi*, 223 F. Supp.2d 583 (D.N.J. 2002) (holding that "maintaining the integrity of [ETS's] testing

process" is not a property interest cognizable under the mail fraud statute). Thereafter, the government obtained superseding indictments against each of the TOEFL defendants, including Petitioners, alleging multiple theories as to how ETS had a "property" interest in the administration of the TOEFL exam:

> ETS had property interests in its TOEFL product, including (i) materials bearing its trademarks, such as the TOEFL exam and score report, (ii) its copyrighted materials, such as the TOEFL exam and its questions, (iii) the ETS-specified test administration and scoring services for the TOEFL exam, and (iv) the value of ETS's goodwill, which is an asset of ETS and is based in part on maintaining the integrity of the testing process.

(App. 86, 99, Superseding Indictments ¶ 1(F)). The superseding indictment further alleges that the defendants:

> "defrauded ETS of the property described in paragraph 1(F) . . . by obtaining *access to and use of* ETS's trademarked materials, copyrighted materials, and services, by obtaining ETS's official score report, and by obtaining *the benefit of, and undermining*, ETS's goodwill and the value of its trademark and copyright."

(App. 88, 101, Superseding Indictments ¶ 6) (emphasis added).

Al Hedaithy moved to dismiss the superseding indictment on the grounds that it failed to state a violation of the mail fraud statute. The district court denied the motion on December 17, 2002. (App. 58, 75, Transcript of Oral Opinion). Al Hedaithy proceeded to a bench trial upon stipulated facts; on February 24, 2003, Judge Irenas found him guilty and imposed a probationary sentence with the understanding

that Al Hedaithy would voluntarily depart the United States. Indeed, under 8 U.S.C. § 1227(a)(2)(I), the conviction rendered Al Hedaithy ineligible to remain in the United States and, under 8 U.S.C. § 1182, he will remain ineligible to return to the United States for at least five years.

The superseding indictment against Al-Aiban charged him with a single count of conspiracy to commit mail fraud, to which he pleaded guilty on March 23, 2003. He was sentenced to a fine of $2,500 and voluntarily departed the United States. Al-Aiban, as well, is now ineligible to return to the United States for at least five years.

### B. The Court of Appeals' Decision

Both Petitioners filed timely notices of appeal from their district court convictions. On May 6, 2003, the United States Court of Appeals for the Third Circuit issued an order consolidating their appeals and, on December 16, 2004, the court affirmed their convictions. *See United States v. Al Hedaithy*, 392 F.3d 580 (3d Cir. 2004). The court of appeals held that, under *McNally v. United States*, 483 U.S. 350 (1987), *Carpenter v. United States*, 484 U.S. 19 (1987), and *Cleveland v. United States*, 531 U.S. 12 (2000), ETS' confidential business information and test score reports satisfied the mail fraud statute's "property" requirement. *Id.* at 593 & n. 15.

With regard to the confidential business information theory, the court opined that *Carpenter* establishes that depriving a victim of its right to the exclusive use of confidential business information is sufficient to violate the statute. *See id.* at 595-96. The court acknowledged that – in contrast to the defendant in *Carpenter* – the TOEFL defendants did not seek to "obtain" any of ETS's

confidential business information. *See id.* at 601-02. Nevertheless, the court held that the mail fraud statute was violated by the TOEFL defendants' *interfering* with ETS's exclusive use of its information. *Id.* (asserting that "Congress intended the second dependent clause of the mail fraud statute ['or for obtaining . . . property by means of false or fraudulent pretenses, representations, or promises'] to broaden the scope of the first clause ['scheme or artifice to defraud']."') (internal citation omitted).

With regard to the test score report theory, the court held that the piece of paper ETS issued to the defendants reporting their TOEFL score satisfies the statutory property requirement. Notwithstanding this Court's holding *Cleveland*, *supra*, that a license cannot satisfy the mail fraud statute's property requirement, the court of appeals purported to distinguish *Cleveland* as turning solely upon the fact that the government issues licenses as a regulator, not as a holder of property. *See id.* at 600. The court of appeals acknowledged that limiting *Cleveland* in this manner would create an anomaly: specifically, cheating on a publicly administered licensing test (such as the bar exam, administered to law school graduates) could not constitute mail fraud under *Cleveland*, but cheating on a privately administered exam (such as the SAT, administered to high school graduates) would constitute mail fraud. *See id.* at 596. Nevertheless, the court of appeals did not provide any rational justification for this anomaly. *See id.* at 600-01.

Al Hedaithy and Al-Aiban now ask this Court to issue a writ of certiorari to review the Third Circuit's December 16, 2004 decision.

## REASONS FOR GRANTING THE PETITION

In *Cleveland v. United States*, 531 U.S. 12 (2000), this Court warned of the federalism problems that would arise were the federal courts to accede to prosecutors' expansive constructions of the mail fraud statute. *Id.* at 24 (declining to construe the mail fraud statute as encompassing misrepresentations made to obtain state-issued licenses or permits because such a construction "would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities"). Here, in holding that cheating on a standardized test is a federal crime under the mail fraud statute, the Third Circuit has worked a sweeping expansion of federal police power, effectively authorizing federal criminal prosecutions when one uses the mail (or the wires, given the identical wording of the wire fraud statute) to interfere with property that has no tangible value to the victim. And, in so holding, the Court has widened an existing circuit split on the question of whether the mail fraud statute is limited to schemes designed actually to "obtain" money or property, or whether the statute is violated even where the defendant did not seek to obtain money or property from the victim. *Compare United States v. Al Hedaithy*, 392 F.3d 580 (3d Cir. 2004) *and United States v. Welch*, 387 F.3d 1081, 1108 n.27 (10th Cir. 2003) *with United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993) *and Monterey Plaza Hotel Ltd. P'ship v. Local 483, Hotel Employees & Rest. Employees Union*, 215 F.3d 923, 926 (9th Cir. 2000).

The Third Circuit's decision not only disregards this Court's warnings, but undermines them. By portraying *Cleveland* as exempting only government-issued licenses from the mail fraud statute's definition of property, the

Third Circuit has encouraged federal prosecution of a wide range of conduct functionally equivalent to that at issue in *Cleveland*, and which is already criminalized under state law.

This Court's consideration of the Third Circuit's decision will impact the approximately sixty (60) substantially identical TOEFL cases pending or recently concluded in the District of New Jersey. *See United States v. Johnson*, 457 U.S. 537, 550 (1982) ("full retroactivity [is] a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place"); *see also Davis v. United States*, 417 U.S. 333, 346-47 (1974) (a defendant who was convicted "for an act that the law does not make criminal" is entitled to vacatur of the conviction to prevent a miscarriage of justice). Perhaps of greater long-term and systemic significance, unless the court of appeals' flawed construction of the mail fraud statute is harmonized with *Cleveland*, and until the growing circuit split resolved, the Third Circuit's opinion will serve as an invitation to federal prosecutors to pursue purely local cases that have no bearing on federal concerns or interests, further burdening the federal courts with litigation that is properly addressed by state courts and local prosecutors. For these reasons, and those discussed below, a writ of certiorari should issue.

## I. THE CIRCUITS ARE SPLIT OVER WHETHER THE MAIL FRAUD STATUTE REQUIRES A SCHEME TO "OBTAIN" MONEY OR PROPERTY FROM THE VICTIM.

The Third Circuit's decision adds to a growing circuit split on the question of whether the mail fraud statute is limited to schemes to "obtain" money or property, or

whether the statute is violated even where the defendant did not seek to obtain money or property from the victim. The Third Circuit has interpreted the mail fraud statute, and this Court's precedents, broadly, holding that the government is not obligated to prove that a defendant sought to "obtain" money or property but, rather, only that the defendant *interfered* with the victim's control of access to its property. *See Al Hedaithy*, 392 F.3d at 602 (stating that defendants argued "any violation of the mail fraud statute must involve a scheme for obtaining the victim's property. We do not read *McNally* or *Cleveland* as providing any such requirement."). The court thereby affirmed Petitioners' convictions for interfering with ETS' "confidential business information," as alleged by the government, even though it acknowledged that Petitioners did not seek or intend to "obtain" any such information. *See id.* at 601-02.

In so holding, the Third Circuit has aligned itself with the Tenth Circuit, which has held that "neither the mail nor wire fraud statute requires that a defendant 'obtain' property before violating the statute." *United States v. Welch*, 387 F.3d 1081, 1108 n.27 (10th Cir. 2003). In contrast, the Seventh and Ninth Circuits have both held that the mail fraud statute cannot be violated except by schemes "for obtaining" the victim's property. Specifically, in *United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993) (Easterbrook, J.), the Seventh Circuit held that a sports agent who gave student-athletes gifts to sign contracts with him while they were still in college, and who then falsified dates on the contracts and lied to universities in order to maintain the athletes' scholastic eligibility, had not committed mail fraud because:

> Both the 'scheme or artifice to defraud' clause and the 'obtaining money or property' clause . . .

> contemplate a transfer of some kind. Accordingly, following . . . the language of § 1341 . . . , we hold that only a scheme to obtain money or other property from the victim by fraud violates § 1341. A deprivation is a necessary but not a sufficient condition of mail fraud.

*Id.* at 1221. In so holding, the Seventh Circuit specifically rejected the government's argument that, to violate the mail fraud statute, "neither an actual nor a potential transfer of property from the victim to the defendant is essential. It is enough that the victim lose; what (if anything) the schemer hopes to gain plays no role in the definition of the offense." *Id.* at 1224.

The Ninth Circuit has adopted the same approach as the Seventh Circuit. In *Monterey Plaza Hotel Ltd. P'ship v. Local 483, Hotel Employees & Rest. Employees Union*, 215 F.3d 923, 926 (9th Cir. 2000), the court of appeals held that "the mail and wire fraud statutes . . . prohibit the use of the mails and wires to obtain money or property from the one who is deceived." There, the Court of Appeals held that a union's efforts to damage a hotel's goodwill did not implicate the mail and wire fraud statutes because the union did not seek to obtain that property: "accepting the business usage that a hotel's goodwill can be, for some purposes, a recognized property right, the Hotel has failed to prove that the Union sought to *obtain* that property through deceptive means." *Id.* at 926 (emphasis in original).

This circuit split stems from a judicial disagreement over how to interpret the statutory language of the mail fraud statute. The relevant portion of the statute contains two clauses:

> "Whoever, having devised . . . any scheme or artifice [1] to defraud, or [2] for obtaining money or property by means of false . . . pretenses. . . . "

*See Scheidler v. National Organization of Women*, 123 S. Ct. 1057, 1065 (2003) (holding that the word "obtained" contemplates "both a deprivation and an acquisition of property"). The Third Circuit declined to give effect to the statutory term "obtaining" by concluding that "'Congress intended the second dependent clause of the mail fraud statute *to broaden* the scope of the first clause.'" *Al Hedaithy*, 392 F.3d at 602 (quoting *United States v. Thomas*, 315 F.3d 190, 198 (3d Cir. 2002)) (emphasis added). According to the Third Circuit, the first clause includes – but is not limited to – the conduct defined in the second clause. *Id.*

The Third Circuit's construction of the statute cannot be reconciled with this Court's decision in *McNally*, or with the plain language of the statute. In *McNally*, 438 U.S. at 357, this Court explained that the "obtaining money or property" phrase was added to the mail fraud statute in 1909 for the purpose of codifying the Court's holding in *Durland v. United States*, 161 U.S. 306-07, 313 (1896) (holding that the statute applied not only to past and present misrepresentations but also to false promises about the future). Thus, the second clause did not *expand or broaden* the reach of the statute, but only made explicit what *Durland* held was already implicit in the first clause – that the statute reaches false promises about the future. *McNally*, 483 U.S. at 358-59 (the 1909 amendment was a "codification of the holding in *Durland*" which "simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property"); *see also*

*Cleveland*, 531 U.S. at 26 (noting that the Court in *McNally* considered the argument that the two phrases could be "'construed independently'. . . . But we rejected that construction of the statute, instead concluding that the second phrase simply modifies the first. . . .").

The plain meaning of the word "or," which connects the first and second clauses, also shows that the Seventh and Ninth Circuits have interpreted the statute correctly, and that the Third Circuit and Tenth Circuit have not. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every . . . word of a statute.'") (citations omitted). Congress could have used "or" between the two clauses to mean: (1) that the clauses are alternatives, or (2) that they are "synonymous, equivalent, or substitutive. . . ." *See* Webster's Third New Int'l Dictionary 1585 (1968). This Court has expressly held that the clauses are *not* alternatives, and may not be read "independently." *Cleveland*, 531 U.S. at 26 (2000). Therefore, giving effect to the word "or" requires that the second phrase – "for obtaining money or property" – be read as "synonymous, equivalent, or substitutive" for the first phrase, "any scheme or artifice to defraud." The second clause thus did not "broaden" but, rather, explained the first clause. Consequently, the "obtaining" requirement necessarily applies to both parts of the mail fraud statute.

The Third Circuit also held that *Carpenter* supports the proposition that the mail fraud statute does not contain an "obtaining" requirement. *See Al Hedaithy*, 392 F.3d at 601-02. Although the defendant in *Carpenter* "clearly obtained" the property at issue (i.e., the victim's confidential business information), the Third Circuit theorized that this "obtaining" was not "the conduct on

which the Court focused." *Id.* The Third Circuit's characterization of this Court's opinion in *Carpenter*, however, is wrong.

*Carpenter* concerns the *misappropriation* of confidential business information. In particular, defendant Winans, an author of a *Wall Street Journal* stock-tip column, and his co-conspirators had traded in securities based upon information that would soon be appearing in the column. The government charged, and the Supreme Court held, that Winans had obtained property from the *Journal* when he misappropriated "the *Journal*'s confidential business information – the prepublication schedule and contents of the . . . column" by sharing it with coconspirators who used it for their purposes. *Carpenter*, 484 U.S. at 25. The defendant's offense, as the government emphasized at oral argument in *Carpenter*, was that he had misappropriated that information, obtaining it for his own purposes:

> Question: "That" is what they took? What precisely is "that?"
>
> [The Solicitor General]: The confidential information regarding the timing and the contents of the column. That a column about – that a column saying "Digital Switch is going to have some good luck, we think," and the fact that that column was going to appear on Wednesday, "that fact" is what they misappropriated. That fact was entrusted to them.

Transcript of Oral Arg. at 24, *Carpenter v. United States*, No. 86-422 (Oct. 7, 1987). Misappropriation inherently involves an obtaining of property. *See, e.g.*, Black's Law Dictionary (8th ed. 2004) (defining the misappropriation as including the element that "the defendant must have taken the information . . . ").

In stark contrast to *Carpenter*, Petitioners here did not obtain, take, or even see any of ETS's confidential business information. Moreover, the TOEFL defendants did not interfere with any effort by ETS to keep its test confidential. Rather, the test-takers paid to sit for Petitioners received the same test materials, at the same time, as everyone else taking the test, and they returned those materials at the end of the exam. After the alleged scheme was complete, ETS had exactly the same interest in its test as it had before, and was free to continue to use it. *Cf. Dowling v. United States*, 473 U.S. 207, 218 (1985) (goods that infringe a copyright are not goods that were "taken by fraud," as the infringer "does not assume physical control over the copyright, nor does he wholly deprive the owner of its use."). Thus, unlike the *Wall Street Journal* in *Carpenter*, ETS was not *deprived* of any confidential business information, and Petitioners did not "obtain" any such property.

As discussed above, this circuit split arises from conflicting constructions off both the mail fraud statute and this Court's decisions in *McNally* and *Carpenter*. Uniformity among the circuits on these issues is of paramount importance. This Court and others have warned that the mail fraud statute is dangerously susceptible to prosecutorial and judicial expansion. *See, e.g., Cleveland*, 531 U.S. at 25 (adherence to the rule of lenity "is especially appropriate in construing § 1341 . . ."); *Walters*, 997 F.2d at 1224 (noting that without an "obtaining" requirement the mail fraud statute could be used to criminalize practical jokes, such as mailing someone an invitation to a non-existent party); *United States v. Evans*, 844 F.2d 36, 41 (2d Cir. 1988) ("We are particularly loath to expand the wire and mail fraud statutes further, since we have already

'tolerated an extraordinary expansion' of these laws.") (internal quotations omitted). Others have cautioned that the mail fraud statute can be used to target unpopular groups for prosecution or to favor powerful special interests that seek to use prosecutors to protect their interests. *E.g.*, *Walters*, 997 F.2d at 1224-25; *United States v. Margiotta*, 688 F.2d 108, 143 (2d Cir. 1982) (Winter, J. dissenting) ("[W]hat profoundly troubles me is the potential for abuse through selective prosecution and the degree of raw political power the freeswinging club of mail fraud affords federal prosecutors."). Here, the mail fraud statute was used to prosecute aliens who the government wrongly suggested could have been involved in terroristic activities; in fact, they were students who engaged in the same sort of cheating perpetrated by students who are United States citizens. *See Al Hedaithy*, 392 F.3d at 607 n. 24 (describing reports of similar instances of cheating).

Given such concerns, it is essential that the scope of the mail fraud statute be clear and consistently applied in every circuit. Therefore, this Court should grant a writ of certiorari to review the Third Circuit's decision.

## II. THE DECISION OF THE COURT OF APPEALS UNDERMINES THIS COURT'S INSTRUCTION IN *CLEVELAND V. UNITED STATES* THAT THE FEDERAL FRAUD STATES MUST BE CONSTRUED WITH DUE REGARD FOR FUNDAMENTAL PRINCIPLES OF FEDERALISM.

The Third Circuit's opinion should be reviewed for the additional reason that the opinion threatens to undermine *Cleveland* in at least one federal circuit. The Third Circuit premised its alternative holding – that the score report issued by ETS satisfies the property requirement – upon

an extremely narrow reading of *Cleveland*, specifically that a license the government issues in its regulatory capacity is not property protected under the mail fraud statute. *See Al Hedaithy*, 392 F.3d at 600. But *Cleveland*, fairly read, expresses a much broader rule about the nature of the property requirement and how, properly construed, it can further the principles of federalism that have shaped this Court's mail fraud jurisprudence.

The opinion below offers a reading of *Cleveland* that is so cramped that it renders *Cleveland* illogical. In particular, *Cleveland* holds that misrepresentations made in connection with a publicly administered licensing test cannot constitute mail fraud. *See Cleveland*, 531 U.S. at 20-21 (holding that misrepresentations on an application for a state-issued gaming license is not mail fraud). Thus, someone who lies in a state bar exam application by misrepresenting the identity of the person who will actually sit for the exam cannot be convicted of mail fraud. By limiting *Cleveland* to government-issued licenses, *see Al Hedaithy*, 392 F.3d at 600, the Third Circuit has held that one who cheats in the exact same way on a privately administered exam, such as the SAT or TOEFL, is subject to federal prosecution. *See id.* at 600 ("Because the issuance of . . . a license is a component of the state's regulatory scheme, the license was held not to be 'property' in the hands of the regulator. . . . Unlike a state, ETS has no sovereign power to regulate."). Nothing in *Cleveland*, nor in the text of the mail fraud statute, requires such an absurd result or suggests that Congress intended to confer such special protection upon private testing companies like ETS.

Similarly, the Court of Appeals held that neither *Cleveland* nor any of this Court's other mail fraud cases

require that the alleged property be of any value in the hands of the victim. *See id.* at 598. It thus opined that the score report can satisfy *McNally* because it is printed on a piece of paper that belonged to ETS. *See Al Hedaithy*, 392 F.3d at 598.

The Third Circuit's opinion creates a conflict among the circuits on this issue as well. Both the Second and Eighth Circuits have held that property of *de minimis* value cannot support a mail fraud charge. *Compare United States v. Schwartz*, 924 F.2d 410, 417-18 (2d Cir. 1991) (describing idea that mail fraud conviction could be premised upon property of *de minimis* held that 'to defraud' meant depriving individuals or the government of something of value") *and United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (mail fraud conviction cannot be based upon "the physical piece of paper that represents the permit" as "it is simply negligible – *de minimis* as a matter of law and insignificant as a matter of fact, apart from the legal entitlement it represents") *with Al Hedaithy*, 392 F.3d at 598 (property of "negligible value" such as a piece of paper can support a mail fraud conviction) and *United States v. DeFries*, 43 F.3d 707, 709 (D.C. Cir. 1995) (same).

The Third Circuit's reading of *Cleveland* disregards the rules for construing and applying the mail fraud statute that the Court announced in that case. First, *Cleveland*, properly read, provides that the key to analyzing whether a particular property theory can support a mail fraud conviction is the nature of the alleged form of property in the victim's hands: "It does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands

of the victim." *Cleveland*, 531 U.S. at 15. Second, settled federalism principles require that the mail fraud statute protect only those forms of property that courts have traditionally recognized, so that the reach of the statute cannot be expanded by overreaching prosecutors or the courts:

> We reject the Government's theories of property rights not simply because they stray from traditional concepts of property. We resist the Government's reading of § 1341 as well because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress. Equating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities. We note in this regard that Louisiana's video poker statute typically and unambiguously imposes criminal penalties for making false statements on license applications. As we reiterated last Term, "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes."

*Id.* at 24-25 (citations omitted).

With regard to the *Cleveland*'s instruction that the property at issue must be something treated as such in the hands of the victim, a test score report is not a traditionally-recognized form of property in the hands of the victim. No case before this one has ever held such a score report to be property. And, like an unissued license, a score report exists for the sole purpose of being given to the test-taker. ETS could never sell it to anyone else; no one would ever

buy it because it does not have any value for one other than the person whose test results it reflects. *Cf.*, *e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982) (property necessarily is something the owner can possess, use, and alienate).[1]

A score sheet in ETS's hands is in this way indistinguishable from a physician's uncommunicated diagnosis, or a lawyer's uncommunicated advice to a client. The Third Circuit's cramped reading of *Cleveland*, if approved, would dictate the absurd result that a patient commits wire fraud if he lies to his doctor about his medical history and the doctor communicates the resulting diagnosis over the telephone; or that a client commits mail fraud if he lies to his lawyer about his intent to pay his bills and causes the lawyer to send a letter containing legal advice. Such statements – whether diagnoses, legal advice, or test scores – do not become "property" merely because they are conveyed in written form, and such conduct should not be made subject to federal criminal jurisdiction without a clear statement by Congress. *Cf. Cleveland*, 531 U.S. at 27 ("Absent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States."); *United States v. Lopez*, 514 U.S. 549, 561 n.3

[1] A score report is, in its essence, nothing more than an embodiment of the services ETS provides. And the law is clear that services are not a traditionally recognized form of property cognizable under the mail fraud statute. *See*, *e.g.*, *United States v. Corona-Sanchez*, 291 F.3d 1201, 1208 (9th Cir. 2002) (describing the positions of "most states," as well as that taken under the Model Penal Code that services are not a traditional form of property); *see also Gleason v. Thaw*, 236 U.S. 558, 561 (1915) (holding that services are not property within the meaning of bankruptcy code provision excepting from discharge liabilities for "obtaining money or property by false pretenses or representations").

(1995) ("Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.' When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'") (citations omitted).

By opening such areas to federal prosecution, the Third Circuit's decision violates the second rule expressed in *Cleveland* – that the federal fraud statutes must be construed with regard to fundamental principles of federalism. The core allegations in the TOEFL cases describe violations of state law that are properly addressed by state law enforcement authorities. For example, false swearing is punishable under New Jersey law. *See* N.J. Stat. Ann. 2C:28-2(a) ("A person who makes a false statement under oath or equivalent affirmation . . . when he does not believe the statement to be true, is guilty of a crime of the fourth degree."). *See also Al Hedaithy*, 392 F.3d at 583 (describing certifications required in TOEFL applications). There is no need, and no basis, for making cheating on private exams a federal crime. As this Court instructed in *McNally*, if Congress wishes to make such conduct a federal crime, "it must speak more clearly than it has." *McNally*, 483 U.S. at 360; *see also Alkaabi*, 223 F. Supp.2d at 591 ("if Congress wishes to make 'cheating on tests' a federal crime, it must do so with greater clarity"). This Court should review the Third Circuit's decision to check this unwarranted expansion of federal criminal jurisdiction.

## CONCLUSION

Petitioners Hany Al Hedaithy and Riyadh Al-Aiban respectfully request that the Court grant their petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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392 F.3d 580

United States Court of Appeals,
Third Circuit.
UNITED STATES of America
v.
Hany Al **HEDAITHY**, Appellant
United States of America
v.
Riyadh Al-Aiban, Appellant.
**Nos. 03-1566, 03-1885.**

Argued June 29, 2004.
Decided Dec. 16, 2004.

Donald C. Randolph (Argued), Randolph & Associates, Santa Monica, CA, for Appellant, Hany Al Hedaithy.

Steven G. Sanders (Argued), Arseneault, Fassett & Mariano, Chatham, NJ, for Appellant Riyadh Al-Aiban.

George S. Leone (Argued), Office of the United States Attorney, Newark, NJ, and Glenn J. Moramarco, Office of the United States Attorney, Camden Federal Building & Courthouse, Camden, NJ, for Appellee.

Before: AMBRO, ALDISERT and STAPLETON, Circuit Judges.

OPINION OF THE COURT

STAPLETON, Circuit Judge.

Defendant Riyadh Al-Aiban appeals his conviction, following an unconditional guilty plea, of conspiracy to commit mail fraud in violation 18 U.S.C. §§ 371 and 1341. Defendant Hany Al Hedaithy appeals his conviction, following a bench trial on stipulated facts, for conspiracy to commit mail fraud in violation of 18 U.S.C. §§ 371 and

1341, and mail fraud in violation of 18 U.S.C. §§ 1341 and 2. Al-Aiban and Al Hedaithy (collectively, "Defendants") are two of approximately sixty foreign nationals of Arab and/or Middle Eastern descent who were charged in the United States District Court for the District of New Jersey for allegedly participating in a scheme by which imposters were paid to sit for the Test of English as a Foreign Language ("TOEFL"), a standardized test administered by the Educational Testing Service ("ETS"). The purpose of the scheme was allegedly to create the false appearance that Defendants, among others, had taken and achieved an acceptable score on the TOEFL exam so that they could remain eligible to live in the United States under a student visa.

Both Defendants challenge the sufficiency of their respective superseding indictments, arguing that the conduct alleged therein does not fall within the proscription of the mail fraud statute. Additionally, Al Hedaithy argues that the evidence presented at his bench trial was not sufficient to support his conviction, and he also challenges the District Court's denial of his motion for discovery with respect to a claim that he was selectively prosecuted by the Government on account of his race or ethnicity. As a threshold matter, we must also decide whether Al-Aiban's guilty plea resulted in a waiver of his right to challenge the sufficiency of his superseding indictment. For the reasons that follow, we will affirm the convictions of each Defendant.

## I.

"For purposes of determining the sufficiency of the superseding [indictments], we assume the truth of the

following facts alleged in the superseding [indictments]." *United States v. Panarella,* 277 F.3d 678, 681 (3d Cir.2002). ETS is in the business of designing and administering certain standardized tests. One of those tests, TOEFL, is commonly used by educational institutions in the United States when considering a student for admission to its academic program. Certain schools require foreign students, as a condition of admission, to achieve a minimum score on the TOEFL exam in order to demonstrate proficiency in the English language. Full-time enrollment at a federally approved school, college, or university is, in turn, a requirement for foreign nationals to obtain a student visa and thus reside legally in the United States.

According to the Government, ETS possesses, and attempts to maintain, goodwill that it has accumulated based upon the integrity of its TOEFL product. ETS has also endeavored to keep its TOEFL exam exclusive, secure, and confidential. It owns registered trademarks in the terms "Educational Testing Service," "ETS," and "TOEFL." It uses these trademarks on its TOEFL examinations and the score reports that it generates for each applicant who takes TOEFL. ETS also owns copyrights in the TOEFL examination itself and in the questions used on each exam. Furthermore, the company restricts access to, and use of, its copyrighted TOEFL exam and questions, its trademarked score reports, and its test administration and scoring services.

When an applicant applies to take the TOEFL exam and pays the required fee, he is provided with an appointment number. The applicant must then appear at a designated test center, provide proof of identity, provide the appointment number, and sign a confidentiality

statement. Pursuant to the confidentiality statement, the applicant promises to preserve the confidentiality of the examination. By signing the statement, the applicant also certifies that he is the same person whose name and address was used in completing the application. The applicant must then have his photograph taken in order to ensure that someone else did not take the exam for the applicant. The photograph subsequently appears on the applicant's score report. Applicants who do not comply with the conditions set by ETS are not permitted to sit for the exam.

Once the TOEFL exam is completed, the exam results are wired from the test center to a company in Baltimore, Maryland, which in turn transmits the results by wire to ETS for processing. ETS then mails each score report to the location designated by the applicant.

In 1999, the Government became aware of a scheme in which Defendants, both Saudi Arabian nationals, and numerous other foreign nationals of Arab and/or Middle Eastern descent, paid an imposter to take and pass the TOEFL exam for them. The purpose of the scheme was to create the false appearance that Defendants themselves had taken and achieved an acceptable score on the TOEFL exam. In furtherance of this scheme, each Defendant applied to take the exam, and then paid money to an imposter to appear at the designated test center and falsely identify himself as the respective Defendant. The imposter then signed the confidentiality statement, had his photograph taken, sat for the TOEFL exam using the respective Defendant's name, and directed that his exam results be mailed to a California address under the control of one Mahmoud Firas. ETS then processed the exam, and the results were mailed to the pre-designated location in

California. There, Firas or one of his associates substituted each Defendant's photograph in place of the imposter's photograph. This doctored score report was then sent to legitimate educational institutions in a phony envelope bearing ETS's trademark.

On May 9, 2002, a federal grand jury returned a one-count indictment charging Al-Aiban with conspiring to commit mail fraud in violation of 18 U.S.C. §§ 371 and 1341. That same day, Al Hedaithy was charged in a two-count indictment with conspiring to commit mail fraud in violation of 18 U.S.C. §§ 371 and 1341, and mail fraud in violation of 18 U.S.C. §§ 1341 and 2. Each indictment described the subject of the Defendant's alleged fraud as ETS's "property interest in maintaining the integrity of the testing process." Subsequently, a federal court dismissed a similarly-worded indictment, holding that the integrity of the testing process was not a property interest covered by the mail fraud statute. *See United States v. Alkaabi,* 223 F.Supp.2d 583, 589-90 (D.N.J.2002).

The Government thereafter filed superseding indictments against Al-Aiban and Al Hedaithy, in which it attempted to describe ETS's property interest in greater detail. Al-Aiban was again charged with one-count of conspiring to commit mail fraud in violation of 18 U.S.C. §§ 371 and 1341, and Al Hedaithy was charged with two counts – conspiring to commit mail fraud in violation of 18 U.S.C. §§ 371 and 1341, and mail fraud in violation of 18 U.S.C. §§ 1341 and 2. Both superseding indictments were identical in their description of ETS's property interest:

> ETS had property interests in its TOEFL product, including (i) materials bearing its trademarks, such as the TOEFL exam and score report, (ii) its copyrighted materials, such as the

> TOEFL exam and its questions, (iii) the ETS-specified test administration and scoring services for the TOEFL exam, and (iv) the value of ETS's goodwill, which is an asset of ETS and is based in part on maintaining the integrity of the testing process.
>
> Each superseding indictment further alleged that:
>
> As part of this conspiracy, the Conspirators defrauded ETS of the property described [above]. They did so by obtaining access to and use of ETS's trademarked materials, copyrighted materials, and services, by obtaining ETS's official score report, and by obtaining the benefit of, and undermining, ETS's goodwill and the value of its trademark and copyright.

Defendants' individual cases then proceeded along significantly different paths. Al-Aiban entered into a plea agreement with the Government, pursuant to which he agreed to enter a guilty plea and waive his right to appeal the conviction.[1] After accepting Al-Aiban's guilty plea, the District Court determined that the final adjusted offense-level was four, and sentenced him to pay a $2,500 fine. This conviction rendered him ineligible to remain in the United States, *see* 8 U.S.C. § 1227(a)(2)(A)(i), and ineligible to return to the United States for at least five years. 8

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[1] The relevant provision of Al-Aiban's plea agreement stated:

> Riyadh Al-Aiban knows that he has, and voluntarily waives, the right to file any appeal, any collateral attack, or any other writ or motion after sentencing, including but not limited to an appeal under 18 U.S.C. § 3742 or a motion under 28 U.S.C. § 2255, which challenges the sentencing court's determination or imposition of the offense level, if the total offense level determined by the court is equal to or less than four.

U.S.C. § 1182. Al-Aiban voluntarily departed the United States following his conviction. He has filed a timely notice of appeal.

Al Hedaithy, on the other hand, challenged both the superseding indictment and the conduct of the prosecution. He filed a motion to dismiss his superseding indictment pursuant to Fed. R.Crim. P 12(b)(2), claiming that it failed to allege conduct that violated the mail fraud statute. Al Hedaithy's motion also claimed that the Government's attempted expansion of the scope of the federal mail fraud statute in this case constituted a violation of his right to due process. The District Court denied the motion. The Court reasoned that the requirements of the mail fraud statute were satisfied because Al Hedaithy obtained from ETS a certificate that he had passed the TOEFL and ETS was thereby deprived of some value of its goodwill.

Thereafter, Al Hedaithy filed a motion requesting discovery in order to support a claim that he, and other defendants in related cases, were being selectively prosecuted as a result of their race or ethnicity. In support of this motion, he provided the District Court with several news articles indicating that thousands of people cheat on the TOEFL exam each year. He further submitted materials suggesting that prior to his case, the Government had never sought to prosecute exam takers for alleged cheating. Moreover, Al Hedaithy pointed out that all of the approximately sixty individuals charged for participating in the alleged scheme were persons from Arab and/or Middle Eastern countries. Finally, he presented evidence that the Government's expressed intent in these cases was to prosecute the participants as part of the war on terrorism.

The District Court held a hearing on Al Hedaithy's discovery motion, at which it assumed that discovery would show that Al Hedaithy was being prosecuted specifically because he was from an Arab and/or Middle Eastern country.[2] The Court, however, held that such a motivation would not be unconstitutional under the equal protection component of the Fifth Amendment.

In conducting an equal protection analysis, the District Court first addressed the appropriate level of scrutiny that should be used. The Court noted that, because there has been no great history of discrimination in the United States against the Middle Eastern population, the level of scrutiny should be rational basis, "but at most would fall into the intermediate level of scrutiny." The Court therefore applied rational basis review, and concluded that a decision to target Middle Eastern and Arab people for prosecution survived such scrutiny. In reaching this conclusion, the District Court reasoned that:

> I don't think I can ignore the reality of what happened on 9/11, or who perpetrated on 9/11, and the pockets of deep and abiding hatred of the United States. . . . I think the Government's in a

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[2] The District Court stated:

> I find that[ ] [the sufficiency of the evidence to order discovery is] a very hard standard to articulate, even after reading the cases, exactly what the quantum of evidence is. That is so – so I'm not making my decision based on some analysis of the quantum of the evidence put forward by the defendant as to selective – I'm assuming that there is some form of selective prosecution going on, you know, in the sense that of the one percent, or whatever it is, that cheat on the exam, they're not uniformly nailing every one and charging them with mail fraud. And they have focused at least for the moment on people of Middle Eastern or Arab descent.

> sense first duty in a way is to protect its own citizens from harm. And I can't say that this is an unconstitutional way of doing it.

Accordingly, the District Court denied Al Hedaithy's motion for discovery. At the conclusion of the hearing, Al Hedaithy made an oral motion to dismiss the superseding indictment based on selective prosecution, and that motion was also denied.

Thereafter, Al Hedaithy's case was tried before the District Court, as the finder of fact, based upon stipulated facts. After the close of evidence, Al Hedaithy was convicted of mail fraud and conspiracy to commit mail fraud under the superseding indictment, and was sentenced to one year probation and a $750 fine.[3] Al Hedaithy has filed a timely notice of appeal.[4]

II.

Al-Aiban contends that our decision in *Panarella*, 277 F.3d at 685, requires that he be afforded an opportunity, pursuant to Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure,[5] to challenge the sufficiency of the

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[3] As with Al-Aiban, the conviction rendered Al Hedaithy ineligible to remain in the United States, and ineligible to return to the United States for at least five years. Al Hedaithy has also voluntarily departed the United States.

[4] The District Court exercised jurisdiction in these two criminal cases pursuant to 18 U.S.C. § 3231. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

[5] Fed.R.Crim.P. 12(b)(3)(B) provides:

> The following must be raised before trial: . . . a motion alleging a defect in the indictment or information – but at any time while the case is pending, the court may hear a claim

(Continued on following page)

superseding indictment despite his unconditional guilty plea. The Government concedes that *Panarella* directly supports Al-Aiban's right to appeal, but argues that our decision in that case was overruled by the Supreme Court in *United States v. Cotton,* 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). According to the Government, *Panarella* is therefore no longer controlling and Al-Aiban's guilty plea served as a waiver of his right to appeal. We reject the Government's interpretation of *Cotton* and hold that *Panarella* obligates us to reach the merits of Al-Aiban's appeal.

In *Panarella,* we expressly held that "Rule 12(b)(2)[6] and our cases applying this Rule permit a defendant who enters an unconditional guilty plea to argue on appeal that the specific facts alleged in the charging document do not amount to a criminal offense." 277 F.3d at 680. As in our case, the defendant in *Panarella* agreed to enter an unconditional plea of guilty. Despite the plea, the defendant subsequently appealed his conviction challenging the sufficiency of the superseding information. In arguing that

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> that the indictment or information fails to invoke the court's jurisdiction or to state an offense.

[6] *Panarella* applied Fed.R.Crim.P. 12(b)(2), which was the predecessor to Rule 12(b)(3)(B). The textual differences between the two versions of the rule represent alterations in form only, and "[n]o change in practice [was] intended." *See* Fed.R.Crim.P. 12(b)(3)(B) advisory committee note. The text of the rule relied upon in *Panarella* provided that:

> The following must be raised prior to trial: . . . Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings).

Fed.R.Crim.P. 12(b)(2) (2001).

he was entitled to raise the sufficiency of the information for the first time on appeal, the defendant presented two arguments. First, he claimed that the issue was a jurisdictional matter that could be raised at any time. Second, he argued that the plain text of Rule 12(b)(2), together with our previous interpretation of that rule, required the *Panarella* Court to reach the merits of his appeal notwithstanding the unconditional guilty plea. We agreed with the defendant's second argument and therefore declined to address his jurisdictional argument.

In addressing Rule 12(b)(2), we noted that we had already held squarely that the rule "applies equally to both objections raised before a District Court and objections raised for the first time before a Court of Appeals," *id.* (citing *Gov. of the Virgin Islands v. Pemberton,* 813 F.2d 626, 631 (3d Cir.1987)), and that it applies "even where a defendant has entered an unconditional guilty plea." *Id.* at 683 (citing *United States v. Cefaratti,* 221 F.3d 502, 507 (3d Cir.2000); *United States v. Spinner,* 180 F.3d 514, 516 (3d Cir.1999)). We also declined the Government's invitation to apply Rule 12(b)(2) narrowly to cover only those cases in which the charging instrument completely neglected to mention an element of the offense. Instead, we felt compelled by our previous decisions to hold that

> for purposes of Rule 12(b)(2), a charging document fails to state an offense if the specific facts alleged in the charging document fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation. Therefore, notwithstanding [the defendant's] unconditional guilty plea, Rule 12(b)(2) permits [him] to argue for the first time on appeal that the specific facts

> alleged in the superseding information do not amount to honest services wire fraud.

*Id.*[7]

In *Cotton,* a superseding indictment charged defendants with a conspiracy to distribute, and to possess with intent to distribute, a "detectable amount" of cocaine and cocaine base in violation of 21 U.S.C. §§ 846 and 841(a)(1). 535 U.S. at 627-28, 122 S.Ct. 1781. The indictment did not, however, allege any drug quantities that would result in enhanced penalties under § 841(b). At trial, the jury was instructed, in accordance with the superseding indictment, that the amount of narcotics involved was not important and the defendants could be convicted as long as it found that a defendant conspired to distribute, or possessed with intent to distribute, the narcotics listed. Based on this instruction, the defendants were convicted. At sentencing, the District Court did not sentence the defendants under § 841(b)(1)(C) (which provided for imprisonment of not more than 20 years for drug offenses involving a "detectable amount" of cocaine or cocaine base), but instead made a finding that the defendants' conspiracy involved more than 50 grams of cocaine base, which implicated the enhanced penalties of § 841(b)(1)(A). *Id.* at 628, 122 S.Ct. 1781. The District Court accordingly sentenced the defendants under the enhanced penalties, and the defendants did not object to the fact that their sentences were based on drug quantities not alleged in the indictment.

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[7] We nevertheless opined that this holding was unwise and urged the Judicial Conference Advisory Committee on Criminal Rules to consider amending Rule 12(b)(2). *Panarella,* 277 F.3d at 688.

On appeal to the Fourth Circuit Court of Appeals, the defendants argued that their sentences were invalid under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).[8] Because the *Apprendi* argument had not been raised in the District Court, the Fourth Circuit reviewed this challenge for plain error, but nonetheless vacated the defendants' sentences. It reasoned that "'because an indictment setting forth all the essential elements of an offense is both mandatory and jurisdictional, . . . a court is without jurisdiction to . . . impose a sentence for an offense not charged in the indictment.'" *Id.* at 629, 122 S.Ct. 1781 (quoting 261 F.3d at 404-05). The Supreme Court rejected this reasoning and reversed the Fourth Circuit's decision.

According to the Supreme Court, the omission of drug quantity from the indictment was not a "jurisdictional" defect. The Court acknowledged that "defects in subject-matter jurisdiction require correction regardless of whether the error was raised in the district court," but nonetheless concluded that "defects in an indictment do not deprive a court of its power to adjudicate a case." *Id.* at 630, 122 S.Ct. 1781. Noting that it was "[f]reed from the view that indictment omissions deprive a court of jurisdiction," *id.* at 631, 122 S.Ct. 1781, the Court proceeded to apply a plain error analysis under Fed.R.Crim.P. 52(b) and *United States v. Olano,* 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Although the Court concluded that the District Court's error in imposing an enhanced sentence was plain, it declined to address whether the defendants' substantial rights were affected because "the

[8] *Apprendi* was decided while the defendants' appeal was pending. 535 U.S. at 628, 122 S.Ct. 1781.

error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 632-33, 113 S.Ct. 1770. This was because, according to the Court, the evidence presented to the jury that the conspiracy involved more than 50 grams of cocaine base was overwhelming and essentially uncontroverted.

The Government interprets *Cotton* as holding that a defendant who fails to challenge the sufficiency of his indictment in the District Court cannot argue for the first time on appeal that the indictment fails to state an offense, unless plain error review is satisfied. Such an interpretation sweeps too broadly. *Cotton* did not hold that a defendant can *never* argue for the first time on appeal that his indictment failed to state an offense. Rather, the Supreme Court's express holding was that "defects in an indictment do not deprive a court of its power to adjudicate a case." 535 U.S. at 630, 122 S.Ct. 1781. In other words, the Court held that indictment defects are not "jurisdictional." *Id.* at 631, 122 S.Ct. 1781. This holding, does not conflict with *Panarella*.

As noted above, the defendant in *Panarella* pursued a jurisdictional argument much like the one rejected in *Cotton*. We expressly declined to address that argument, however, noting that the authority relied on by the defendant as was "murky."[9] We instead based our holding on the

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[9] In particular, we stated:

> Apart from Rule 12(b)(2), the source of law on which Panarella's "jurisdictional" argument rests remains murky; it is unclear to us whether the argument relies on the Fifth Amendment's Grand Jury Clause, putative statutory or Article III limits on federal courts' subject matter jurisdiction, or some rule of federal common law. Indeed, we are unsure whether use of the term "jurisdictional" to refer to challenges

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language of Rule 12(b)(2), which we treated as independent of any jurisdictional ground. *See id.* at 631, 122 S.Ct. 1781 ("Because we hold that Rule 12(b)(2) requires us to entertain this appeal notwithstanding Panarella's unconditional guilty plea, we need not reach Panarella's alternative 'jurisdictional' argument for why this appeal survives his guilty plea."). Accordingly, the basis of our holding in *Panarella* was neither addressed nor rejected in *Cotton*.

The Government nonetheless insists that the defendants in *Cotton* raised an argument based on Rule 12(b)(2) and that the Supreme Court rejected it. In support of this contention, the Government suggests that the defendants argued in their briefing to the Supreme Court that Rule 12(b)(2) allowed them to bring their challenge to the indictment at any time, but the Court implicitly rejected the defendants' reliance on Rule 12(b)(2) by instead applying the plain error analysis of Rule 52(b). The Government's reasoning is in error.

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to the sufficiency of an indictment is anything more than simply a label used to announce the conclusion that a particular defense survives a guilty plea. *See* Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure,* 75 Mich. L.Rev. 1214, 1232 n. 36 (1977) ("[O]nce we have explained why a certain category of defenses survives a plea of guilty, we may find it useful to describe the category as 'jurisdictional' defenses. But calling a defense 'jurisdictional' is a conclusion, not an explanation: it does nothing to explain why the defense should be deemed to survive a guilty plea." (internal citation omitted)).

277 F.3d at 682 n. 1. Our assessment of Panarella's jurisdictional argument was apparently prescient given the Supreme Court's rejection of this argument in *Cotton*.

Clearly, *Cotton* made no mention of Rule 12(b)(2), even though the rule was cited in the defendants' briefing. This was not surprising, however, given the manner in which the defendants in *Cotton* relied upon the Rule. Contrary to the Government's suggestion, the defendants never raised the argument that we accepted in *Panarella*. Rather, Rule 12(b)(2) was raised in the *Cotton* briefing merely as support for the uncontroversial proposition that a jurisdictional defect is one that may be raised at any time. *See* Supreme Court Brief for Respondents at 10, 20, No. 01-687, 2002 WL 463382 (2002). Given that the defendants in *Cotton* never attempted to rely upon Rule 12(b)(2) as an independent ground for challenging a defective indictment, we do not construe *Cotton* as having rejected our holding in *Panarella* that such a ground exists.

Accordingly, *Panarella* dictates that Al-Aiban must be permitted, in accordance with Rule 12(b)(3)(B), to challenge for the first time on appeal the sufficiency of his superseding indictment. It is to that issue we now turn.

## III.

"'In order to be valid, an indictment must allege that the defendant performed acts which, if proven, constituted a violation of the law that he or she is charged with violating.'" *United States v. Zauber,* 857 F.2d 137, 144 (3d Cir.1988) (quoting *United States v. Gimbel,* 830 F.2d 621, 624 (7th Cir.1987)). Defendants' primary argument on appeal is that the facts alleged in the superseding indictments, as a matter of law, do not constitute a conspiracy to violate, or a violation of, the federal mail fraud statute, 18 U.S.C. § 1341. The question presented is whether these superseding indictments adequately alleged that Defendants

engaged in a scheme to defraud ETS of a traditionally recognized property interest. We will first review the applicable law, and then address the Government's argument that the superseding indictments sufficiently allege mail fraud violations under well-established theories of mail fraud liability. We will next address several arguments advanced by Defendants for the proposition that the superseding indictments do not implicate the mail fraud statute. Finally, we conclude that the superseding indictments sufficiently alleged mail fraud violations.[10]

A.

The federal mail fraud statute, 18 U.S.C. § 1341 provides, in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, [uses the mails or causes them to be used], shall be fined under this title or imprisoned not more than 20 years, or both.

"To prove mail or wire fraud, the evidence must establish beyond a reasonable doubt (1) the defendant's knowing and willful participation in a scheme or artifice to defraud, (2) with the specific intent to defraud, and (3) the use of the mails or interstate wire communications in

[10] The question of whether the superseding indictments alleged facts that are within the ambit of the mail fraud statute is a question of statutory interpretation subject to plenary review. *See Panarella,* 277 F.3d at 685.

furtherance of the scheme." *United States v. Antico,* 275 F.3d 245, 261 (3d Cir.2001) (citing *United States v. Clapps,* 732 F.2d 1148, 1152 (3d Cir.1984)). A sufficient charging document must therefore allege the foregoing three elements.[11] Additionally, the object of the alleged scheme or artifice to defraud must be a traditionally recognized property right. *United States v. Henry,* 29 F.3d 112, 115 (3d Cir.1994) ("[T]o determine whether a particular interest is property for purposes of the fraud statutes, we look to whether the law traditionally has recognized and enforced it as a property right."). This rule is embodied in a trilogy of Supreme Court cases that, each party agrees, governs the outcome of this appeal: *McNally v. United States,* 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), *Carpenter v. United States,* 484 U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987), and, most recently, *Cleveland v. United States,* 531 U.S. 12, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000). We agree that these three decisions must frame our analysis, and we review each in turn.

1.

In *McNally,* the defendants were charged with, and convicted of, violating § 1341 by devising a scheme to defraud the Commonwealth of Kentucky's citizens and government of their "intangible right" to have the Commonwealth's affairs conducted honestly. 483 U.S. at 352, 107 S.Ct. 2875. The Supreme Court was asked to determine whether the deprivation of "honest services" fell within the scope of the mail fraud statute. In addressing

[11] It is undisputed in this case that the superseding indictments adequately allege use of the mails as the predicate for application of § 1341.

this issue, the Court was required to review the legislative history of the statute. The Court noted that the original statute, enacted in 1872, referred solely to "any scheme or artifice to defraud." *Id.* at 356, 107 S.Ct. 2875. The sparse legislative history of that enactment "indicate[d] that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property." *Id.* The Court also noted that Congress subsequently amended the mail fraud statute in 1909, "add[ing] the words 'or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises' after the original phrase 'any scheme or artifice to defraud.'" *Id.* at 357, 107 S.Ct. 2875.

> Because the two phrases identifying the proscribed schemes appear in the disjunctive [*i.e.*, "any scheme ... to defraud, *or* for obtaining money or property"], it is arguable that they are to be construed independently and that the money-or-property requirement of the latter phrase does not limit schemes to defraud to those aimed at causing deprivation of money or property.

*Id.* at 358, 107 S.Ct. 2875. In fact, according to the Court, that is exactly the approach taken by the several courts that interpreted "schemes to defraud" as including those schemes designed to deprive victims of things other than money or property, such as "honest services." *Id.* The Supreme Court, however, rejected such an approach.

The Court recognized that it had long ago held that "the words 'to defraud' commonly refer 'to wrongdoing one in his property rights by dishonest methods or schemes,' and usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching.'" *Id.* (quoting

*Hammerschmidt v. United States,* 265 U.S. 182, 188, 44 S.Ct. 511, 68 L.Ed. 968 (1924)). Congress' 1909 amendment of the statute, the Court held, did not alter this understanding of the words "to defraud." Rather, "adding the second phrase simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." *Id.* at 359, 107 S.Ct. 2875. Accordingly, the Supreme Court decided that § 1341 must be read "as limited in scope to the protection of property rights." *Id.* at 360, 107 S.Ct. 2875.[12] As such, the Court held that a scheme to deprive the Commonwealth of Kentucky of "honest services" was not within the scope of § 1341 and therefore reversed the defendants' convictions. *Id.* at 361, 107 S.Ct. 2875.[13]

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[12] In reaching this holding, the Court noted that it was applying the rule that: When there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. . . . As the Court said in a mail fraud case years ago: "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." *Fasulo v. United States,* 272 U.S. 620, 629, 47 S.Ct. 200, 202, 71 L.Ed. 443 (1926). Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.

483 U.S. at 360, 107 S.Ct. 2875.

[13] It should be noted that Congress responded to *McNally* by enacting 18 U.S.C. § 1346. In doing so, Congress brought within § 1341 the proscription against "schemes or artifices to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. Also in response to *McNally,* Congress amended § 1341 to add a proscription against counterfeiting. Neither of these modifications, however, are relevant in this case.

2.

The Supreme Court next addressed the mail fraud statute in *Carpenter,* in which the defendant was alleged to have violated that statute by defrauding the Wall Street Journal (the "Journal") of "confidential business information." 484 U.S. at 24, 108 S.Ct. 316. One of the defendants, a reporter for the newspaper, wrote a regular column discussing selected stocks and giving positive and negative information about those stocks. The Journal's policy was that before the publication of each column, its contents were the Journal's confidential information. *Id.* at 23, 108 S.Ct. 316. Despite that policy, the defendant entered into a scheme by which he gave employees of a brokerage firm advance information as to the timing and contents of the column. Those brokers then traded on the prepublication information.

After the scheme was revealed, the reporter and the brokers were charged with violations of the securities laws and the mail and wire fraud statutes. The issue addressed by the Supreme Court was whether the contents of the Journal column, which were fraudulently misappropriated by the reporter, constituted "money or property" under the mail and wire fraud statutes in light of *McNally.*[14] In affirming the defendant's conviction, the Court noted that this was not a case like *McNally.* According to the Court, the Journal, as the defendant's employer,

> was defrauded of much more than its contractual right to his honest and faithful service, an interest

[14] The Court noted that "[t]he mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here." 484 U.S. at 25 n. 6, 108 S.Ct. 316.

> too ethereal in itself to fall within the protection of the mail fraud statute, which "had its origin in the desire to protect individual property rights." *McNally, supra,* at 359, n. 8, 107 S.Ct., at 2881, n. 8. Here, the object of the scheme was to take the Journal's confidential business information – the publication schedule and contents of the "Heard" column – and its intangible nature does not make it any less "property" protected by the mail and wire fraud statutes. *McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights.

*Id.* at 25, 108 S.Ct. 316. The Court reasoned that "confidential business information has long been recognized as property," and the Journal "had a property right in keeping confidential and making exclusive use, prior to publication, of the schedule and contents of [its] column." *Id.* at 26, 108 S.Ct. 316 (citations omitted).

Additionally, the Court rejected the defendant's argument that a scheme to defraud required a monetary loss. Rather, the Court held, "it is sufficient that the Journal has been deprived of its right to exclusive use of the information, for exclusivity is an important aspect of confidential business information and most private property for that matter." *Id.* at 26-27, 108 S.Ct. 316.

The Court also rejected the defendant's argument that his conduct amounted to no more than a violation of workplace rules and did not constitute fraudulent activity. Contrary to the defendant's assertion, the Court concluded that he had clearly "defrauded" the Journal under the "common understanding" of that word, as previously set forth in *McNally*: "wrongdoing one in his property rights by dishonest methods or schemes." *Id.* at 27, 108 S.Ct. 316.

Embezzlement, the Court noted, falls under this definition. Accordingly, the Court "ha[d] little trouble in holding that the conspiracy here to trade on the Journal's confidential information is not outside the reach of the mail and wire fraud statutes." *Id.* at 28, 108 S.Ct. 316.

3.

Finally, in *Cleveland,* the defendant was charged and convicted of violating the mail fraud statute by making false statements in applying to the Louisiana State Police for a license to operate video poker machines. 531 U.S. at 15, 121 S.Ct. 365. The question addressed by the Supreme Court was whether the Louisiana video poker license qualified as "property" within the scope of § 1341. In deciding this issue, the Court held that "[i]t does not suffice . . . that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim." *Id.* at 15, 121 S.Ct. 365. Accordingly, the Supreme Court went on to consider "whether a government regulator parts with 'property' when it issues a license." *Id.* at 20, 121 S.Ct. 365. In analyzing this issue, the Court first noted that Louisiana's "core concern" in issuing licenses was regulatory, and, as such, Louisiana law established a typical regulatory program for issuing video poker licenses. *Id.* at 20-21, 121 S.Ct. 365. The function of this regulatory scheme, according to the Court, resembled other licensing schemes that have long been characterized as the exercise of state police powers.

The Court rejected the assertion that Louisiana had a property interest in its licenses merely because of the substantial sums of money it receives in exchange for each

license. The Court acknowledged that Louisiana had a substantial economic stake in the video poker industry, but also noted that the lion's share of fees received by the state with respect to the licenses is received only after the license is issued; not pre-issuance. Moreover, the Court reasoned that: "[w]ere an entitlement of this order sufficient to establish a state property right, one could scarcely avoid the conclusion that States have property rights in any license or permit requiring an upfront fee, including drivers' licenses, medical licenses, and fishing and hunting licenses." *Id.* at 22, 121 S.Ct. 365.

The Court also rejected the assertion that the licenses were property because of the state's significant control over the issuance, renewal, suspension, and revocation of the licenses. According to the Court, "Louisiana's right to choose the persons to whom it issues video poker licenses" was not a an interest long recognized as property. *Id.* at 23, 121 S.Ct. 365. Rather, such "intangible rights of allocation, exclusion, and control amount to no more and no less than Louisiana's sovereign power to regulate. . . . Even when tied to an expected stream of revenue, the State's right of control does not create a property interest any more than a law licensing liquor sales in a State that levies a sales tax on liquor. Such regulations are paradigmatic exercises of the States' traditional police powers." *Id.*

The Court further rejected the Government's assertion that Louisiana's licensing power was no different than a franchisor's right to select its franchisees. The crucial difference between these two rights, the Court stated, is that "a franchisor's right to select its franchisees typically derives from its ownership of a trademark, brand name, business strategy, or other product that it may trade or sell in the open market." *Id.* at 24, 121 S.Ct. 365. Louisiana's

authority, on the other hand, rested not upon any such asset but upon the state's "sovereign right to exclude applicants deemed unsuitable to run video poker operations." *Id.*

Because the Court concluded that the video poker license at issue was not property in the hands of the State of Louisiana, it held that the defendant's conduct did not fall within the scope of the mail fraud statute, and therefore reversed the defendant's conviction.

B.

According to the Government, the superseding indictments advance theories of mail fraud liability that comport with the Supreme Court's decisions in *McNally, Carpenter,* and *Cleveland.* The Government argues, *inter alia,* that the superseding indictments properly allege that ETS was defrauded of at least two traditionally recognized property interests: (1) its confidential business information, and (2) its tangible score reports. We address each of these theories below.[15]

[15] The Government also advances theories of mail fraud liability based upon the allegation that ETS was defrauded out of its goodwill, its test administration and scoring services, and its TOEFL product as a whole. Because we agree that the superseding indictments sufficiently allege mail fraud violations with respect to ETS's confidential business information and score reports, we need not address any additional theories upon which the superseding indictments may be advanced.

1.

As noted above, the superseding indictments alleged that ETS possesses a property interest in the materials bearing its trademarks and its copyrighted materials, "such as the TOEFL exam and its questions."[16] The superseding indictments sufficiently alleged, according to the Government, that the TOEFL exam and its questions constituted the confidential business information of ETS. The Government contends that this case is like *Carpenter* inasmuch as the superseding indictments allege that the Defendants' scheme required the hired test-takers to make a misrepresentation to ETS in order to gain access to, and sit for, the TOEFL exam. We agree with the Government's analysis.

"'Confidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit.'" *Carpenter,* 484 U.S. at 20, 108 S.Ct. 316 (quoting 3 W. Fletcher, *Cyclopedia of Law of Private Corporations* § 857.1, at 260 (rev. ed.1986)). Such information includes trade secrets, *see id.* (citing *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1001-04, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984)), which are defined as "'any formula, pattern, device or compilation of information

[16] We note that Defendants devote extensive discussion to their contention that ETS's trademarks and copyrights are not property interests cognizable under the mail fraud statute. We do not address this argument because, as our discussion indicates, it has no relevance here. The superseding indictments do not allege that ETS was defrauded of its trademarks and copyrights, but rather the materials bearing those trademarks, and the materials protected by copyright. The dispositive question is whether those materials themselves are property.

which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.'" *Ruckelshaus,* 467 U.S. at 1001, 104 S.Ct. 2862 (quoting *Restatement (Second) of Torts* § 757, cmt. b). In our case, ETS's TOEFL exam satisfies this definition. According to the indictments, ETS is in the business of preparing and administering the TOEFL exam. The examination provided ETS with a competitive advantage over others in the business of test administration insofar as performance on the exam, according to the indictments, was the yardstick by which educational institutions measured English proficiency in their admissions processes. The indictments also indicate that ETS therefore goes to great lengths to protect the confidentiality and exclusivity of its exam. No person is permitted access to sit for the TOEFL exam unless he pays a fee, promises to preserve the confidentiality of the exam, and represents to ETS that he is the person whose name and address were used in applying to sit for the exam. The facts alleged in the superseding indictment are therefore sufficient to conclude that the TOEFL exam and its questions were confidential business information. The only question remaining with respect to this theory of mail fraud liability is whether Defendants engaged in a scheme "to defraud" ETS of such property.

As we set forth above, *McNally* held that "the words 'to defraud' commonly refer 'to wrongdoing one in his property rights by dishonest methods or schemes,' and usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching.'" 483 U.S. at 358, 107 S.Ct. 2875 (quoting *Hammerschmidt,* 265 U.S. at 188, 44 S.Ct. 511). In accordance with *McNally,* we consider whether the superseding indictments allege that Defendants engaged

in a scheme to deprive ETS of a property right in its confidential business information, and whether that deprivation was accomplished through dishonest means.

*Carpenter* dictates that ETS "had a property right in keeping confidential and making exclusive use" of its confidential business information. 484 U.S. at 26, 108 S.Ct. 316. *Carpenter* further instructs that the Government need not allege that ETS suffered a monetary loss. *Id.* ("Petitioners cannot successfully contend . . . that a scheme to defraud requires a monetary loss, such as giving the information to a competitor.").[17] Rather, for purposes of showing a mail fraud violation, it is sufficient to allege that ETS "has been deprived of its right to exclusive use of the [confidential business] information." *Id.* at 26-27. Such deprivation was clearly set forth in the superseding indictments.

According to the indictments, ETS assiduously protected the exclusivity of its TOEFL exam, allowing access only to those persons who agreed to keep the exam confidential and who provided a representation as to their identity. Defendants' alleged scheme, however, required hired test-takers to gain access to ETS's TOEFL exam on terms other than those prescribed by ETS. The indictments allege that ETS would not have allowed the hired test-takers to sit for the exam had it known that they were not actually the Defendants, and had it known that they did not actually agree to preserve the exam's confidentiality. Accordingly, it was sufficiently alleged that ETS was

[17] Accordingly, insofar as Defendants contend that the Government was required to allege that ETS "lost" its confidential business information, we reject those contentions as foreclosed by *Carpenter*.

deprived of a recognized property interest: the "right to decide how to use" its confidential business information, *i.e.*, the TOEFL exam.

Finally, the scheme alleged in the superseding indictments required hired test-takers to falsely identify themselves as each Defendant, thereby misrepresenting to ETS their true identities. The scheme further required the hired testtakers to sign ETS's confidentiality statement in the name of each Defendant, giving ETS the false impression that the signatories had agreed to preserve the confidentiality of the TOEFL exam. We therefore have little trouble concluding that the superseding indictments sufficiently alleged that the deprivation of ETS's property right was accomplished through deceit, trickery, chicanery, or other fraudulent means.

Defendants insist, however, that the theory of mail fraud liability that was adopted in *Carpenter* is not applicable here. They contend that the alleged scheme did not interfere with any effort by ETS to keep its test confidential. To the contrary, Defendants argue, the hired test-takers received the same test materials at the same time as everyone else who paid ETS's fee, and like everyone else they returned those materials to ETS at the end of the designated time. According to Defendants, after the alleged scheme was completed, ETS had exactly the same interests in the TOEFL exam as it had before, and ETS was free to continue to use the exam. These arguments are unconvincing.

Contrary to Defendants' claims, the superseding indictments clearly alleged that the Defendants' scheme interfered with ETS's efforts to keep its test confidential. Here, the hired test-takers were not otherwise entitled to

gain access to the TOEFL exam. As noted above, their misrepresentations deprived ETS of the ability to choose which individuals would be permitted such access. Moreover, the fact that the hired test-takers received the same test materials at the same time as everyone else is irrelevant to the confidentiality of the test. Defendants appear to suggest that the TOEFL exam was no longer confidential business information once all test-takers received it. That suggestion, however, misconstrues the facts alleged in the indictments. According to the superseding indictments, ETS requires each person who sits for the TOEFL exam, in accordance with the confidentiality statement, to undertake a continuing obligation to keep the exam confidential. The hired test-takers, however, did not sign the confidentiality statement in their own names and were therefore not bound by the same obligations that legitimate test-takers agreed to. After the alleged scheme was complete, therefore, the TOEFL exam was no longer confidential vis-a-vis the hired test-takers. Accordingly, we reject the contention that ETS would have exactly the same interests in its TOEFL exam as it had before the alleged scheme was complete.

2.

The Government also contends that the superseding indictments clearly alleged that ETS was defrauded of tangible property. As we noted above, the indictments alleged that ETS possesses a property interest in the "materials bearing its trademarks, such as the TOEFL . . . score report." The same misrepresentations that the hired test-takers made in order to gain access to the TOEFL exam, the Government claims, were also used to fraudulently obtain tangible documents from ETS. In accordance

with the alleged scheme, these documents bore the name of each Defendant, but in fact reflected both the photograph of, and the exam score achieved by, the hired test-taker. Defendants do not dispute that the scheme alleged in the indictments involved obtaining the TOEFL score reports through misrepresentations. Rather, they contend that these documents cannot be considered property cognizable under the mail fraud statute. While Defendants' argument merits some discussion, we conclude that it is ultimately unavailing.

As Defendants suggest, *Cleveland* dictates that, in order to be cognizable under the mail fraud statute, the score reports must be considered property in the hands of ETS. Defendants insist, however, that a score report does not exist except to be given to the test-taker, that ETS cannot use it for any other purpose, and that ETS cannot sell one person's score report to any other person. Rather, according to Defendants, it is nothing more than the embodiment of the services that ETS provides, and that the paper and ink used to create a score report does not make it property. Defendants also argue that, because *Cleveland* clearly holds that a such a score report would not be property if it was issued by a governmental entity, to hold that ETS's score report is property in the hands of ETS would create a serious anomaly whereby the Defendants' alleged scheme would not be considered mail fraud if it related to a state licensing examination, such as a bar exam or a medical licensing exam, but would be considered mail fraud with respect to the TOEFL exam, the Scholastic Aptitude Test, the Law School Admissions Test, or any other privately administered standardized test.

As to Defendants' first contention – that the score reports are not property in the hands of ETS – we disagree.

ETS is alleged to be in the business of administering the TOEFL exam and issuing score reports. While it is true that the score reports represent the end result of the services provided by ETS, they are nonetheless tangible items produced by ETS, and ETS reserves the right to convey these items only to those individuals who meet its prescribed conditions. We do not think it credible for Defendants to contend that tangible items, held in the physical possession of a private entity, are not property. To the extent that Defendants pursue this argument, we construe it as a contention that the mail fraud statute does not apply to property with *de minimis* value.

In support of a *de minimis* exception to the mail fraud statute, Defendants cite to *United States v. Schwartz,* 924 F.2d 410, 417-18 (2d Cir.1991) and *United States v. Granberry,* 908 F.2d 278, 280 (8th Cir.1990). Both *Schwartz* and *Granberry* addressed the question of whether unissued licenses were property in the hands of a governmental entity for purposes of the federal fraud statutes. Correctly foretelling the outcome in *Cleveland,* both Courts held that such unissued licenses were not property. *Schwartz* and *Granberry* also addressed the Government's argument that the licenses were nonetheless property by virtue of the paper they were printed on. In rejecting this argument, the Second Circuit stated:

> This proposition is patently absurd. In the present instance, the [governmental entity] was not in the paper and ink business, it is a regulatory agency with the power to grant or withhold a license. The paper licenses given appellants were merely the expression of its regulatory imprimatur, and they had no other effect as "property" beyond their role as representatives of this regulatory grant. . . . Further, the value of the paper,

> ink and seal at issue is plainly inconsequential and – as *McNally* held that "to defraud" meant depriving individuals or the government of something of value – must be deemed *de minimis* as a matter of law.

*Schwartz,* 924 F.2d at 418 (citations omitted). *Granberry* rejected a similar argument, stating:

> A governmental permit may in some sense be property in the hands of the person who receives it, but licensing authorities have no property interest in licenses or permits, and allegations that they were obtained by fraud are not sufficient to state an offense under Section 1341. The physical piece of paper that represents the permit is tangible enough, but it is simply negligible – de minimis as a matter of law and insignificant as a matter of fact, apart from the legal entitlement it represents.

908 F.2d at 280 (citation omitted).

*Schwartz* and *Granberry* are, of course, both distinguishable from the case before us in that ETS is not a governmental licensing entity. Accordingly, the primary rationale for holding that the licenses in those cases were not property within the meaning of the federal fraud statutes is not applicable here. It is thus certainly possible to attribute *Schwartz'* s and *Granberry'* s rejection of the Government's attempts to salvage its indictments, by arguing that the licenses were property due to their tangibility, to the Courts' conclusion that the unissued licenses were not property in any case. Nevertheless, it is also possible to read *Schwartz* and *Granberry* as recognizing a *de minimis* exception to the mail fraud statute regardless of whether the victim is a governmental licensing entity.

Even if we read *Schwartz* and *Granberry* in the manner suggested by Defendants, however, we must reject their arguments because our recognition of a generally applicable *de minimis* exception would conflict with a prior decision of this Court.

In *United States v. Martinez*, 905 F.2d 709, 715 (3d Cir.1990), we took the position that unissued governmental licenses were property within the meaning of the mail fraud statute. Although this holding was later overruled by the Supreme Court in *Cleveland*, at least some of the rationale for our decision in *Martinez* lives on. The defendant in that case presented several arguments in support of his contention that a medical license issued by the Commonwealth of Pennsylvania was not property within the meaning of the mail fraud statute. One of these arguments was that "someone who fraudulently acquires property that has great value once acquired[ ] has not violated the mail fraud statute if the item acquired had no, or negligible, value in the hands of the victim." *Id.* at 713. Whereas *Schwartz* and *Granberry* may be read to have accepted this argument, we found no support for it:

> Nothing in the statutory language supports [the defendant's] theory. The statute, which proscribes "obtaining money or property," is broad enough to cover a scheme to defraud a victim of something that takes on value only in the hands of the acquirer as well as a scheme to defraud a victim of property valuable to the victim but valueless to the acquirer.
>
> Martinez points to the language in *McNally* that "the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property." 483 U.S. at 356, 107 S.Ct. at 2879. Arguably, taken

> out of context, this could signify that the statute applies only when the victim has been deprived of a valuable property right. However, the Court was clearly not focusing on the technical argument made here by Martinez but only on the issue presented in that case – whether property includes the ethereal right to honest government.

*Id.* We also found it significant that, in *Carpenter,* the Supreme Court held that no allegation of a monetary loss to the victim was required, but that the deprivation of a property interest alone was sufficient to constitute a mail fraud violation. Accordingly, we rejected the general proposition that the mail fraud statute is not implicated if the property defrauded has no value in the hands of the victim.[18]

Our analysis of this issue in *Martinez* survives the Supreme Court's decision in *Cleveland.* In *Cleveland,* the Supreme Court held that Louisiana's unissued video poker license was not "property" in the first instance because it was merely representative of the state's sovereign power to regulate. 531 U.S. at 21, 121 S.Ct. 365. In *Martinez,* however, we assumed (albeit incorrectly) that an unissued license *was* "property" in the hands of the Commonwealth, and held that the license was not stripped of its status as "property" merely because it had negligible value in the hands of the Commonwealth. Thus, in our case, where we have no doubt that tangible pieces of paper held in the possession of a private entity are "property," *Martinez*

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[18] We went on to reason in *Martinez,* however, that, even if we accepted the defendant's construction of the mail fraud statute, we would nonetheless conclude that the medical licenses at issue did have value in the hands of the Commonwealth. 905 F.2d at 713.

dictates that these items are no less "property" simply because they have negligible value.

The D.C. Circuit Court of Appeals' decision in *United States v. DeFries,* 43 F.3d 707, 707-08 (D.C.Cir.1995), is also persuasive on this issue. In *DeFries,* several union officials were charged with mail fraud for the alleged theft, alteration, and destruction of ballots in a 1988 union merger referendum. The District Court dismissed the indictment on the ground that the theft of ballots did not constitute significant enough deprivations and thus, under *McNally,* were not cognizable under § 1341. In defending that dismissal on appeal, the defendants conceded that the ballots were the tangible property of the union, but argued that they were of such *de minimis* value – worth no more than the paper or ink used in their printing – that they failed to meet some threshold standard of significance implicit in the mail fraud statute. Responding to this argument, the D.C. Circuit stated:

> It is difficult to see where the defendants find this *de minimis* exception. The mail fraud statute speaks only of "money or property" generally, not of property above a certain value. *McNally* incidentally quotes language from a 1924 case suggesting that the words "'to defraud' . . . usually signify the deprivation of *something of value* by trick, deceit, chicane or overreaching," 483 U.S. at 358, 107 S.Ct. at 2881 (emphasis added) (quoting *Hammerschmidt v. United States,* 265 U.S. 182, 188, 44 S.Ct. 511, 512, 68 L.Ed. 968 (1924)), but it does so simply to demonstrate that the mail fraud statute protects only traditional forms of property; there is no suggestion that once the subject of a fraud is determined to be property, it must additionally meet some threshold of value.

*Id.* at 709. Accordingly, the Court expressed significant doubts regarding the *de minimis* exception recognized in *Schwartz* and *Granberry*. Nonetheless, the Court concluded that it need not decide the issue because the ballots in question had more than *de minimis* value:

> Here the tangible property taken was not only substantially greater in scale than the single sheets of paper at issue in the two *de minimis* cases, but was also the sole physical embodiment of valuable information about member preferences, information that was costly to produce and would be at least as costly to recreate. That this information was of more than *de minimis* value to the union is made clear by the organization's willingness to commit substantial resources to gathering it: as detailed in the indictment, the merger election involved the printing, national distribution, collection, and processing of thousands of official ballots at significant union expense. *Cf. Carpenter,* 484 U.S. at 26, 108 S.Ct. at 320-21 (noting that efforts spent to generate and compile business information support the claim of a property interest in that information). The defendants' alleged theft, alteration, and destruction of some of those ballots invalidated the entire enterprise and undid the union's investment. Indeed, even if it were actually proven at trial that the defendants tampered with fewer ballots than necessary to turn the election, the theft would nevertheless undermine the election's credibility – and thus the value of the union's entire investment in the process – if accompanied by evidence of a risk of broader wrongdoing.

*Id.* at 710. The D.C. Circuit also went on to address the defendants' argument that the ballots merely represent the union's interest in democratic self-governance, which

was found inadequate in *McNally.* The Court rejected this argument, reasoning that it confused means and ends: "[a] piece of property does not lose its status as such, nor is its value any less substantial, simply because it is held for ends that are abstract and that thereby seem non-property-like." *Id.* at 710-11. Accordingly, the Court reinstated the indictment, finding that the referendum ballots and the information that they embodied indeed constituted property under § 1341.

We are confronted with circumstances nearly identical to *DeFries,* and we find the D.C. Circuit's analysis persuasive. Here, even assuming the existence of a *de minimis* exception under the mail fraud statute, the superseding indictments sufficiently allege that the score reports obtained under Defendants' scheme were valuable. Like the ballots in *DeFries,* ETS's score reports are the sole physical embodiment of substantial and valuable services that ETS provides. Moreover, even though the Defendants' scheme allegedly defrauded ETS of only approximately sixty score reports, the fraud allegedly perpetrated on ETS (like the theft of union ballots in *DeFries* ) undermined its credibility, "and thus the value of [its] entire investment in the process." *Id.* Insofar as the superseding indictments allege that ETS has developed substantial goodwill due to the integrity of its TOEFL testing process, we conclude that such goodwill makes ETS's score reports valuable, exceeding any potential *de minimis* threshold that may be required by the mail fraud statute.

As to Defendants' second contention – that finding ETS's score report to constitute property would lead to a result inconsistent with *Cleveland* – such an argument misunderstands the fundamental basis of the Supreme Court's reasoning in that case. As we explained above, the

result in *Cleveland* was based upon the conclusion that the issuance of government licenses is an exercise of a state's police powers to regulate. Because the issuance of such a license is a component of the state's regulatory scheme, the license was held not to be "property" in the hands of the regulator. Such reasoning is wholly inapplicable in this case. Here, ETS is a private business that provides a service and reports test results in pursuit of a profit-seeking endeavor. Unlike a state, ETS has no sovereign power to regulate.

Moreover, the Court in *Cleveland* made several observations in reaching its holding that are crucial to our analysis. Significantly, the Court rejected the Government's argument that Louisiana's licensing power was akin to a franchisor's right to select franchisees. The Court noted that "a franchisor's right to select its franchisees typically derives from its ownership of a trademark, brand name, business strategy, or other product that it may trade or sell in the open market." 531 U.S. at 24, 121 S.Ct. 365. Louisiana's licensing authority, the Court noted, does not rest on any similar asset, but rather upon its sovereign right to exclude applicants it deems unsuitable. Unlike the State of Louisiana, ETS's power to issue score reports, which are relied upon by educational institutions, rests squarely on its ownership of the "ETS" trademark and the copyrights to its various examinations. Unlike a sovereign state, ETS can sell its "licensing authority" to others. We therefore conclude that our decision in this case is not at all inconsistent with the Supreme Court's holding in *Cleveland.*

Our conclusion that this case differs significantly from *Cleveland* is well illustrated by the Sixth Circuit's decision in *United States v. Frost,* 125 F.3d 346 (6th Cir.1997). In

that case, the Court held that the University of Tennessee has a property interest in its unissued diplomas under the mail fraud statute, notwithstanding the fact that governmental entities do not have a property interest in their unissued licenses:

> In general, the concept of "property" refers to a "bundle of rights" which includes the rights to possess, use, exclude, profit, and dispose. *See Brotherton v. Cleveland,* 923 F.2d 477, 481 (6th Cir.1991). Although we have recognized that a degree is a property interest of the graduate, *see Crook v. Baker,* 813 F.2d 88, 98-99 (6th Cir.1987), we also have held that the government does not have a property right in a license which it has not issued yet for the purposes of the mail fraud statute. *See Murphy,* 836 F.2d at 253-54; *see also United States v. Kato,* 878 F.2d 267, 269 (9th Cir.1989) (under mail fraud statute, unissued pilot license is not property of government); *but see United States v. Salvatore,* 110 F.3d 1131, 1139-43 (5th Cir.1997) (unissued video poker license is property of government for purposes of mail fraud). We believe that an unissued university degree differs from an unissued regulatory license. Ultimately, a university is a business: in return for tuition money and scholarly effort, it agrees to provide an education and a degree. The number of degrees which a university may award is finite, and the decision to award a degree is in part a business decision. Awarding degrees to inept students, or to students who have not earned them, will decrease the value of degrees in general. More specifically, it will hurt the reputation of the school and thereby impair its ability to attract other students willing to pay tuition, as well as its ability to raise money. The University

> of Tennessee therefore has a property right in its unissued degrees[.]

*Id.* at 367. We see no principled distinction between the unissued diplomas in *Frost* and ETS's score reports in this case.

In accordance with the foregoing, we hold that the superseding indictments sufficiently alleged that Defendants engaged in a scheme to defraud ETS of traditionally recognized property interests in its confidential business information and TOEFL score reports.[19]

C.

In holding that the superseding indictments sufficiently allege mail fraud violations, we must also consider three additional arguments advanced by Defendants. First, they argue that, in order to sufficiently state a violation, a mail fraud charge must include an allegation that their scheme was designed to actually "obtain" the victim's property.[20] Second, and relatedly, Defendants suggest that our Court in *United States v. Zauber,* 857 F.2d 137 (3d Cir.1988), and the Supreme Court in *Cleveland,* have categorically rejected the contention that the "right

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[19] Because the Government's theories of property rights in this case are consistent with traditional concepts of property, we need not address Defendants' arguments with respect to the rule of lenity. *See Cleveland,* 531 U.S. at 24, 121 S.Ct. 365.

[20] We note, however, that this argument would only implicate our analysis of the Government's theory of mail fraud liability with respect to the deprivation of ETS's confidential business information. As for ETS's score reports, however, Defendants' argument is inapposite because the superseding indictments clearly allege that the Defendants's scheme was designed to obtain the TOEFL score reports.

to control" one's property is itself a property interest. Third, they insist that ETS could not have been defrauded of any property because Defendants fully paid the fee required by ETS to sit for the TOEFL exam and receive a score report. We address each of these arguments in turn.

1.

We reject Defendants' first argument, primarily because it is inconsistent with the Supreme Court's decision in *Carpenter*. Although the defendants in *Carpenter* clearly "obtained" the Journal's confidential business information, this was not the conduct, according to the Court, that constituted the mail fraud violation. Rather, the conduct on which the Court focused was the act of fraudulently depriving the Journal of the exclusive use of its information.

Furthermore, Defendants' argument misconstrues the language of other relevant decisions. For example, they rely upon the Supreme Court's statement in *Cleveland* that "[i]t does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim." 531 U.S. at 15, 121 S.Ct. 365. The context in which this statement was written, however, clarifies that the Court was not setting out a requirement that a mail fraud scheme must be designed to "obtain" property. Rather, this language reflects the Court's conclusion that a victim has been defrauded of "property," within the meaning of the mail fraud statute, only if that which the victim was defrauded of is something that constitutes "property" in the hands of the victim.

Defendants also insist that their interpretation of the mail fraud statute is supported by the Supreme Court's holdings, in *McNally* and *Cleveland,* that § 1341's second clause – "or for obtaining money or property by means of false or fraudulent promises" – "simply modifies" the first clause – "any scheme or artifice to defraud." *McNally,* 483 U.S. at 359, 107 S.Ct. 2875; *Cleveland,* 531 U.S. at 26, 121 S.Ct. 365. Defendants construe this language as meaning that any violation of the mail fraud statute must involve a scheme for obtaining the victim's property. We do not read *McNally* or *Cleveland* as providing any such requirement. In *McNally,* the language relied upon by Defendants was used by the Court in rejecting the Government's argument that the first clause of § 1341 could be read alone without reference to the second clause. In *Cleveland,* this language was used by the Court in rejecting the Government's argument that the second clause could be read alone without reference to the first clause. In neither case, however, did the Court hold that a mail fraud violation requires that the second clause of § 1341 be satisfied.

We explained the interaction between the first and second clauses of § 1341 in *United States v. Thomas,* 315 F.3d 190 (3d Cir.2002), in which we stated that "Congress intended the second dependent clause of the mail fraud statute to broaden the scope of the first clause. The mail fraud statute was thus intended to cover 'any scheme or artifice to defraud [one of his money or property],' *including* any '[scheme] for obtaining money or property by means of false or fraudulent . . . promises.'" *Id.* at 198 (quoting *McNally,* 483 U.S. at 351, 107 S.Ct. 2875) (second alteration in original). Under Defendants' interpretation of § 1341, however, the statute would cover "any scheme or artifice to defraud [one of his money or property]," *but*

*limited to* any "[scheme] for obtaining money or property." Such an interpretation contravenes our holding in *Thomas* and we must therefore reject it.[21]

2.

With respect to Defendants' second argument, we do not find that our decision in *Zauber* is inconsistent with our analysis of this case. In *Zauber*, 857 F.2d at 140-41, the administrators of an employee pension fund were charged with mail and wire fraud for causing the pension fund to

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[21] Accordingly, we reject Defendants' reliance upon *Scheidler v. National Organization of Women, Inc.*, 537 U.S. 393, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003), as unavailing. They argue that *Scheidler* reinforces their proposition that a loss of control over one's property is not a sufficient deprivation to satisfy the mail fraud statute.

In *Scheidler*, the National Organization of Women ("NOW") sued abortion protesters under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(a), (c), and (d), for "engaging in a nationwide conspiracy to shut down abortion clinics through 'a pattern of racketeering activity' that included acts of extortion in violation of the Hobbs Act, § 1951." NOW argued that the defendants violated the Hobbs Act by depriving abortion clinics of the right to control what medical services they offered to women. The Supreme Court rejected that argument. It found undisputed that the defendants had "interfered with, disrupted, and in some instances completely deprived [abortion clinics] of their ability to exercise their property rights." 537 U.S. at 404, 123 S.Ct. 1057. The Court held, however, that such conduct did not violate the Hobbs Act because the defendants did not actually "obtain" or "acquire" the clinics' property. *Id.* at 405, 123 S.Ct. 1057.

We do not find *Scheidler* applicable to this case because of a crucial distinction between the Hobbs Act and the mail fraud statute. Unlike the mail fraud statute, the Hobbs Act expressly requires the Government to prove that the defendant "obtain[ed] property from another." 18 U.S.C. § 1951(b)(2) (defining the term "extortion"). As we discuss above, however, a mail fraud violation may be sufficiently found where the defendant has merely deprived another of a property right.

invest money in an entity whose principals then paid kickbacks to the administrators. In support of its indictment, the Government argued, *inter alia,* that the pension fund suffered an actual loss of money or property because the pension fund was deprived of control over its money. Our Court, focusing on a footnote in *McNally,* reasoned that the footnote "suggests . . . that such a theory is too amorphous to constitute a violation of the mail fraud statute as it is currently written." *Id.* at 147. Defendants argue that if the pension fund's loss of control over its money did not constitute a mail fraud violation in *Zauber,* then ETS's loss of control over who may take the TOEFL exam and receive a score report also cannot constitute a mail fraud violation.

There is a crucial distinction, however, between the loss of control we addressed in *Zauber* and ETS's deprivation in this case. In *Zauber,* the defendants were officers of the pension fund whom we recognized had the power and authority to invest the fund's money. The purported loss of control that we addressed in that case was the defendants' assertion of control over the pension fund's money that the pension fund itself might not otherwise have made. *See id.* at 146. Here, however, the asserted deprivation is not merely that ETS would have chosen to control its property in a manner different from Defendants. Rather, the deprivation in this case is identical to that asserted in *Carpenter, i.e.,* the deprivation of ETS's right to *exclusive* use of its property.

Remarkably, Defendants also contend that the Supreme Court rejected the "loss of control" theory in *Cleveland.* As noted above, the Court indeed held that Louisiana's right to control its issuance of state licenses was not a property right recognized under the mail fraud

statute. That holding, however, was expressly premised on the fact that such control "amount[ed] no more and no less than Louisiana's sovereign power to regulate." 531 U.S. at 23, 121 S.Ct. 365. There is no suggestion in *Cleveland,* especially given the Court's holding in *Carpenter,* that the Court's reasoning with respect to the State of Louisiana could be extended to the property interests of private entities. We therefore reject Defendants' reliance on *Cleveland.*

3.

Defendants also attribute significance to the fact that ETS was fully paid for access to the TOEFL exam and receipt of the score report. They cite to *Cleveland* for the proposition that since ETS was paid in full, it could not have been deprived of any money or property. This reference to *Cleveland,* however, is misleading. As noted above, the Court in *Cleveland* rejected the Government's argument that Louisiana's video poker license constituted property merely because of the state's large economic stake in the industry. 531 U.S. at 22, 121 S.Ct. 365. After rejecting that argument, the Court stated:

> Tellingly, as to the character of Louisiana's stake in its video poker licenses, the Government nowhere alleges that Cleveland defrauded the State of any money to which the State was entitled by law. Indeed, there is no dispute that TSG paid the State of Louisiana its proper share of revenue, which totaled more than $1.2 million, between 1993 and 1995. If Cleveland defrauded the State of "property," the nature of that property cannot be economic.

*Id.* This text, does not, contrary to Defendants' argument, suggest that a person has not been defrauded out of property so long as that property is fully paid for. Rather, we read this quoted text as referring to the uncontroversial proposition that, if the object of which the victim was alleged to have been defrauded was fully paid for, then the victim could not have been defrauded of any *money.* That does not end the inquiry, however, as to whether the victim was defrauded of the object itself.

Moreover, *Carpenter* makes clear that a financial loss is not a required element under the mail fraud statute. As our discussion above indicates, the Supreme Court expressly rejected the argument that a scheme to defraud requires a monetary loss. 484 U.S. at 27, 108 S.Ct. 316. Rather, the Court found it sufficient that the Journal was defrauded of the right to exclusive use of its confidential business information.

The flaw in Defendants' argument is well-illustrated by the Second Circuit's decision in *United States v. Schwartz,* 924 F.2d 410, 421 (2d Cir.1991). In that case, Litton Industries agreed to sell night vision equipment to the defendant, but conditioned the sale on a promise that the defendant would not violate the U.S. export law by reselling the equipment to undocumented foreign customers. The defendant agreed to the condition, paid for the equipment in full, received it, and then broke his promise. The defendant was then charged and convicted of wire fraud. On appeal, he argued that he had not defrauded Litton of the equipment because it suffered no economic harm. The Second Circuit rejected this argument, stating:

> [T]he fact that Litton was paid for its night vision goggles does not mean that Litton received all it bargained for. In fact, it did not. Litton insisted its

> product not be exported from the country illegally and defendants' conduct deprived Litton of the right to define the terms for the sale of its property in that way, and cost it, as well, good will because equipment Litton, a government contractor, sold was exported illegally. The fact that Litton never suffered – and that defendants never intended it – any pecuniary harm does not make the fraud statutes inapplicable. The record sufficiently demonstrates that Litton sold its products to appellants only because of their deceit and misrepresentations, which were offered as consideration for Litton to contract with them. Hence, appellants' convictions for wire fraud against Litton should be affirmed.

*Id.* at 421; *see also Walker v. Galt,* 171 F.2d 613, 614 (5th Cir.1948) ("'The vendor has the right to select the person to whom he will sell. . . . [F]raud may be predicated upon misrepresentations as to the identity of the purchaser. . . . '"). We agree with the Second Circuit's analysis. Accordingly, the only conclusion we draw from the fact that ETS was paid in full is that ETS was not defrauded of any money. This fact, however, bears no relevance to whether ETS was otherwise defrauded of its property.

## IV.

Al Hedaithy's second primary argument on appeal challenges the sufficiency of the evidence upon which his conviction is based. We apply a "particularly deferential" standard of review with respect to a challenge to the sufficiency of evidence supporting a guilty verdict. *United States v. Cothran,* 286 F.3d 173, 175 (3d Cir.2002) (quoting *United States v. Dent,* 149 F.3d 180, 187 (3d Cir.1998)). The verdict must be sustained if there is substantial

evidence to support it. *Burks v. United States,* 437 U.S. 1, 17, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *United States v. Beckett,* 208 F.3d 140, 151 (3d Cir.2000). If "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," this Court will sustain the verdict. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *see Cothran,* 286 F.3d at 175. We do not re-weigh the evidence presented at trial or reassess the credibility of the witnesses, *Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Cothran,* 286 F.3d at 175, and we will overturn a guilty verdict "only if no reasonable juror could accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt." *United States v. Coleman,* 811 F.2d 804, 807 (3d Cir.1987).

Prior to his bench trial, Al Hedaithy stipulated to the facts alleged in his superseding indictment. Because we hold that the facts alleged in the indictment were sufficient to state a mail fraud violation, we must also conclude that the District Court's guilty verdict was based on sufficient evidence.

Al Hedaithy's arguments to the contrary are premised on suppositions that we have rejected above. For example, he argues that the Government presented no evidence that the alleged scheme was designed to obtain any property from ETS. As we have explained, however, the mail fraud statute does not require that a scheme be designed to obtain any property from the victim; rather it is sufficient that the scheme is designed to fraudulently deprive the victim of property or an interest in property. We therefore conclude that Al Hedaithy's argument is inapplicable with

respect to ETS's confidential business information. We also believe his argument is inapplicable with respect to ETS's score reports because Al Hedaithy stipulated that the scheme was designed to obtain the TOEFL score reports.

Al Hedaithy also argues that the Government presented no evidence that he obtained from ETS, or deprived ETS of, it copyrights, trademarks, or goodwill. As noted above, however, such evidence was not necessary in order to sustain his conviction. Instead, the Government has sufficiently alleged, and the stipulations sufficiently support, theories of mail fraud liability based upon the deprivation of ETS's confidential business information and TOEFL score reports.

We agree with the Government that Al Hedaithy, in advancing this sufficiency of the evidence challenge, has merely restated his legal challenge to the sufficiency of his superseding indictment. We rejected those arguments above and we similarly reject them here.

V.

Finally, Al Hedaithy argues that the District Court erred in denying his motion for discovery to pursue a selective-prosecution claim.[22] The District Court's denial of discovery is reviewed for abuse of discretion. *See United States v. Berrigan,* 482 F.2d 171, 181 (3d Cir.1973). "An abuse of discretion exists where the district court's decision rests

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[22] According to the Supreme Court, "[a] selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong,* 517 U.S. 456, 463, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996).

upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *International Union, United Auto., Aerospace and Agr. Implement Workers of America, UAW v. Mack Trucks, Inc.*, 820 F.2d 91, 95 (3d Cir.1987).

As we have noted above, the District Court assumed, without deciding, that Al Hedaithy had presented sufficient evidence to warrant discovery and such discovery would show that Al Hedaithy and approximately sixty related defendants were prosecuted selectively because they were of Arab and/or Middle Eastern descent. The Court concluded, however, that such a selective prosecution would survive an equal protection analysis. The District Court applied rational basis review, and concluded that "in making a prosecutorial decision to target Middle Eastern and Arab people for prosecution, I can't say is an irrational exercise of prosecutorial discretion." Accordingly, the District Court concluded that Al Hedaithy would not prevail on his selective-prosecution claim even assuming his discovery motion was granted. The Court therefore denied the motion.

The District Court erred in its belief that further equal protection analysis was required after assuming that discovery would reveal that the decision to prosecute Al Hedaithy was based upon his race or ethnicity. According to the Supreme Court, a prosecutor's discretion to enforce the law, though broad, is nonetheless constrained by the equal protection component of the Due Process Clause of the Fifth Amendment. *United States v. Armstrong,* 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (citing *Bolling v. Sharpe,* 347 U.S. 497, 500, 74 S.Ct. 693, 98 L.Ed. 884 (1954)). In accordance with this constraint, the Supreme Court has held that "the decision

whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id.* (quoting *Oyler v. Boles,* 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962)). This holding indicates that an equal protection analysis is already incorporated into the Court's selective-prosecution jurisprudence, and, more importantly, that a prosecutorial decision made on the basis of race is *per se* unjustifiable. Accordingly, once a defendant adequately shows that the prosecutor's decision was based upon his race, the defendant has succeeded on his selective-prosecution claim and he is entitled to a proper remedy.[23] The District Court was therefore not entitled to assume, without deciding, that discovery would show Al Hedaithy was prosecuted on the basis of his Arab and/or Middle Eastern descent, without also holding that he had prevailed on his selective-prosecution claim.

For these reasons, we conclude that the District Court abused its discretion. This conclusion, however, does not end our analysis. The Government contends that, despite the District Court's error, its ultimate decision to deny discovery was correct. It insists that Al Hedaithy failed to satisfy the threshold showing necessary to entitle him to discovery on his selective-prosecution claim. According to the Government, it would have been error for the District Court to grant Al Hedaithy's discovery motion, and we should therefore affirm the Court's denial.

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[23] The precise nature and scope of that remedy, however, has not yet been delineated. *See Armstrong,* 517 U.S. at 461 n. 2, 116 S.Ct. 1480 ("We have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race.").

The record before us contains Al Hedia[illegible]'s motion for discovery, as well as the documents that Al Hedaithy offered in support of his motion. Accordingly, we may independently review whether he was entitled to discovery. After conducting such a review, we agree with the Government that Al Hedaithy failed in any case to satisfy the substantial evidentiary threshold necessary to obtain discovery on his selective prosecution claim, and he therefore suffered no prejudice as a result of the District Court's abuse of discretion.

In *Armstrong,* the Supreme Court explained that in order to succeed in a selective-prosecution claim, "[t]he claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'" 517 U.S. at 465, 116 S.Ct. 1480 (quoting *Wayte,* 470 U.S. at 608, 105 S.Ct. 1524). To complement this "rigorous standard" for proving a selective-prosecution claim, the Supreme Court requires "a correspondingly rigorous standard for discovery in aid of such a claim." *Id.* at 468, 105 S.Ct. 1524. The required threshold to obtain discovery is "'some evidence tending to show the existence of the essential elements of the defense,' discriminatory effect and discriminatory intent." *Id.* (quoting *United States v. Berrios,* 501 F.2d 1207, 1211 (2d Cir.1974)).

With respect to the first essential element – discriminatory effect – the Supreme Court requires the claimant to make a "credible showing" that "similarly situated individuals of a different race were not prosecuted." *Id.* at 465, 470, 105 S.Ct. 1524. In *Armstrong,* the defendant, in furtherance of his selective-prosecution claim, supported his discovery motion with an affidavit from a paralegal in the Federal Public Defender's Office, as well as an accompanying

study, indicating that "in every one of the [twenty-four] [21 U.S.C.] § 841 and § 846 cases closed by the office during 1991, the defendant was black." *Id.* at 459, 116 S.Ct. 1480. The Supreme Court held that this study and affidavit did not meet the threshold standard of "some evidence" because these materials "failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not prosecuted." *Id.* at 470, 116 S.Ct. 1480.

In a subsequent decision, *United States v. Bass,* 536 U.S. 862, 863, 122 S.Ct. 2389, 153 L.Ed.2d 769 (2002) (per curiam), the Court reiterated that a defendant must make a "credible showing" that similarly situated individuals of a different race were treated differently. In *Bass,* the evidence presented to support the discriminatory effect element were "nationwide statistics demonstrating that '[t]he United States charges blacks with a death-eligible offense more than twice as often as it charges whites' and that the United States enters into plea bargains more frequently with whites than it does with blacks." *Id.* In concluding that this was not sufficient "credible evidence," the Court stated:

> Even assuming that the *Armstrong* requirement can be satisfied by a nationwide showing (as opposed to a showing regarding the record of the decisionmakers in respondent's case), raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*. . . . Under *Armstrong,* therefore, because respondent failed to submit relevant evidence that similarly situated persons were treated differently, he was not entitled to discovery.

*Id.* at 863-64, 122 S.Ct. 2389.

Applying the standard set forth by the Supreme Court in *Armstrong* and *Bass* to this case, we conclude that Al Hedaithy did not present sufficient credible evidence of discriminatory effect. The evidence that he did present was in the form of numerous newspaper articles.[24] According to

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[24] These newspaper articles included: (1) an article quoting the director of test security at ETS as stating that, of the 800,000 people who sit for the TOEFL exam each year, less than 1% are found to have cheated, *see* William Branigin, *Testing Probe Turns to Terrorist Links,* Wash. Post, May 28, 2002, at B05; (2) an article stating that "three times in the past 10 years, Chinese students were disqualified en masse from [TOEFL], and the Graduate Record Exam, or GRE," Daniel Walfish, *A School for Scandal,* Far Eastern Economic Review, Nov. 16, 2000, at 78; (3) an article quoting a university administrator noting that "cheating on the TOEFL is 'fairly common,' but has never in his memory resulted in criminal charges," Susan Greene, *5 Arrested in Scam to Pass Exams,* Denver Post, May 8, 2002; (4) an article reporting that NBA basketball player Jayson Williams had arranged for someone else to take his SATs, *see* Shaun Assael, *ad Blood,* ESPN The Magazine, Aug. 2002; and (5) two articles reporting that several expert test takers had orchestrated a scheme to take the TOEFL on the East Coast, report the results to confederates who encoded them on pencils, and then sold the encoded pencils to customers who took the test later that day on the West Coast. The articles stated the Government brought charges against the expert test takers, but they did not indicate the customers were prosecuted. *See* Fiona Havers, *Testing Fraud Exposed: GRE, GMAT, TOEFL Cheating Scam Uncovered,* Yale Herald, Oct. 31, 1996; Rose Kim, *Man Arrested in Test Cheating Scheme,* Newsday, Oct. 29, 1996, at A27.

Al Hedaithy's Supplemental Appendix also contains two additional newspaper articles that were published after the District Court's denial of his discovery motion. While our Court may normally take judicial notice of newspaper articles, *see Ieradi v. Mylan Laboratories, Inc.,* 230 F.3d 594, 598 n. 2 (3d Cir.2000), the issue before us is not whether these articles exist or whether they contain reliable information. Rather, we must determine whether the evidence actually presented to the District Court was sufficient to order discovery. Accordingly, we do not consider these extra-record materials.

Al Hedaithy, these articles demonstrate that at least several thousand people cheat on the TOEFL exam each year, yet, with the exception of Al Hedaithy and the approximately sixty related Arab and/or Middle Eastern defendants who participated in the relevant scheme, the Government has never before prosecuted such cheaters for any offense. The defect in Al Hedaithy's proffer is that none of this evidence indicates that *similarly situated* persons were treated differently. Demonstrating that thousands of other people have also cheated on the TOEFL exam does nothing to identify persons who are similarly situated. It is not possible to tell, from the evidence presented by Al Hedaithy, whether the thousands of people who cheat on the TOEFL exam each year are involved in widespread conspiracies, or have paid someone else to take the exam for them. Al Hedaithy, who paid an imposter to take the TOEFL exam so that he could obtain admission to an educational institution and remain eligible to reside legally in the United States, is not similarly situated with a hypothetical individual who cheats by merely copying his neighbor's answers. Nor is Al Hedaithy similarly situated with one who has not engaged in a scheme involving approximately sixty other foreign nationals attempting through fraud to maintain their residency in the United States. In short, Al Hedaithy presented no evidence indicating that the Government has ever uncovered a similar mail fraud scheme involving persons who were not Arab and/or Middle Eastern, but did not prosecute them. Accordingly, we conclude that Al Hedaithy did not present sufficient "credible evidence" of discriminatory

effect.[25] He was therefore not entitled to discovery on his selective-prosecution claim.

Because Al Hedaithy was not otherwise entitled to discovery, we will not reverse the District Court's denial of his discovery motion.

VI.

For the foregoing reasons, the judgments of the District Court will be affirmed.

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[25] We therefore need not address the discriminatory motive element.

[1] UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY,
CAMDEN, NEW JERSEY, 08101

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| THE UNITED STATES OF AMERICA,<br>VS.<br>MANSOUR HOSIAN AL-HAJERI<br>FAHAD M. ALYAMANI<br>HANY AL-HEDAITHY<br>DEFENDANTS. | CRIMINAL DOCKET NUMBER<br>02-363 (JEI)<br>02-367 (JEI)<br>02-379 (JEI) |

DECISION ON MOTION TO DISMISS

DECEMBER 17, 2002
MITCHELL COHEN COURTHOUSE
JOHN F. GERRY PLAZA,
CAMDEN, NEW JERSEY, 08101

BEFORE: THE HONORABLE JOSEPH E. IRENAS
SENIOR JUDGE,
U.S. DISTRICT COURT JUDGE,
DISTRICT OF NEW JERSEY

APPEARANCES:

GEORGE S. LEONE, ASSISTANT U.S. ATTORNEY, WILLIAM FITZPATRICK, ASSISTANT U.S. ATTORNEY, LUIS VALENTIN, ASSISTANT U.S. ATTORNEY, MARK WINSTON, ASSISTANT U.S. ATTORNEY, BOHDAM VITVITSKY, ASSISTANT U.S. ATTORNEY, FOR THE UNITED STATES OF AMERICA.

[2] APPEARANCES CONTINUED

GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE, BY: LAWRENCE S. LUSTBERG

ESQUIRE, ATTORNEY FOR THE EMBASSY
OF SAUDI ARABIA

RANDOLPH AND ASSOCIATES,
(VIA TELEPHONE)
BY: DONALD C. RANDOLPH, ESQUIRE,
AND
HOFFMAN, POLLOK & PICKHOLZ, LLP,
BY SUSAN C. WOLFE, ESQUIRE,
FOR DEFENDANT, HANY AL HEDAITHY

THOMAS ABBENANTE, ESQUIRE,
ATTORNEY FOR DEFENDANT,
MANSOUR AL-HAJERI

STEPHEN J. DANER,
REGISTERED PROFESSIONAL REPORTER,
CERTIFIED SHORTHAND REPORTER,
OFFICIAL U. S. REPORTER

[3] (THE FOLLOWING TAKES PLACE IN OPEN COURT). (OFF RECORD).

(BACK ON RECORD).

THE COURT: THE MAIL FRAUD STATUTE IS, AS WE STARTED OUT WITH, SAYS THAT'S IT BASICALLY ILLEGAL TO DEVISE ANY SCHEME OR ARTIFICE TO DEFRAUD. AT LEAST RELEVANT TO THIS CASE.

THE COURTS HAVE REPEATEDLY HELD, AT LEAST IN THE CURRENT INCARNATION, THE CONCEPT OF DEFRAUDING IS THE CONCEPT OF DEPRIVING SOMEBODY OF A PROPERTY, OF A PROPERTY RIGHT – WHATEVER THAT MEANS, RIGHT OF PROPERTY. THIS PLAYED OUT INITIALLY BECAUSE THEY USED TO USE THE MAIL FRAUD STATUTE, AND I GUESS THEY STILL DO IN LIGHT

OF THE RECENT AMENDMENT, BUT USED TO USE THE MAIL FRAUD STATUTE TO TALK ABOUT DEFRAUDING MEMBERS OF THE PUBLIC OF THE RIGHT TO HONEST GOVERNMENT SERVICES. THEN YOU HAD THE *MCNALLY* CASE, AND THEN AN AMENDMENT TO THE STATUTE THEREAFTER.

WHAT WE HAVE IN THIS CASE I CONSIDER TO BE A PATTERN WHICH IS RELATIVELY UNIQUE. I DO NOT BELIEVE, ALTHOUGH I'M SURE THE CIRCUIT WILL FIND OTHERWISE, THAT THE CASE LAW, EITHER THE SUPREME COURT LEVEL OR CIRCUIT LEVEL REALLY HAS FOCUSED ON IT, FOCUSED ON CORRECTLY. AS I SEE IT, WE HAVE A FAIRLY UNIQUE ISSUE, HERE. YOU HAVE ORGANIZATIONS – EVERY UNIVERSITY I GUESS OR EVERY SCHOOL THAT ISSUES A CERTIFICATE MIGHT BE ONE OF THEM. BUT IN ADDITION TO SCHOOLS, YOU HAVE [4] ORGANIZATIONS LIKE ETS, RED CROSS, UL, AND A BUNCH OF OTHER ORGANIZATIONS WHICH CERTIFY EITHER AN INDIVIDUAL OR A PRODUCT AS HAVING CERTAIN CHARACTERISTS – A HARVARD DIPLOMA SAYS YOU – WHAT DOES IT'S SAY? GEE, IT'S A DIFFICULT ONE. IT SAYS YOU HAVE REACHED A CERTAIN LEVEL OF EDUCATIONAL COMPETENCE IN WHATEVER PARTICULAR FIELD THE DIPLOMA IS IN. A RED CROSS CERTIFICATE MIGHT CERTIFY YOU ARE A SENIOR LIFESAVER. UL MIGHT CERTIFY THE TOASTER IS SAFE WHEN USED WITH ENGLISH MUFFINS. HAIR DRESSER SCHOOL MAY GIVE OUT A CERTIFICATE SAYING YOU KNOW HOW TO CUT HAIR. AND YOU CAN GO ON AND ON AND ON. THERE'S JUST IN OUR SOCIETY, WE'RE BECOMING CRAZY FOR CERTIFICATIONS. WE WANT SOMEBODY

ELSE TO SAY THAT YOU HAVE THESE QUALIFICATIONS OR THE PRODUCT HAS THESE QUALIFICATIONS.

THE WHOLE – ETS HAS BUILT UP A RATHER LARGE ORGANIZATION BASED ON CERTIFYING COMPETENCE IN A HUGE VARIETY OF SITUATIONS; ADVANCE PLACEMENTS EXAMS, TALKING ABOUT SAT'S, ACHIEVEMENT EXAMS CHIEF EXAMS, LAW BOARDS, MEDCATS, GOES ON AND ON. I'M SURE – WHO ELSE – TOEFL. BUT THEY CERTIFY, YES, YOU HAVE COMPETENCE IN ENGLISH. CERTIFIES COMPETENCE IN GERMAN, COMPETENCE IN PREMED STUDIES, COMPETENCE IN PRE-LAW STUDIES. BECAUSE THE CERTIFICATIONS ARE RECOGNIZED AS VALUABLE NOT NECESSARILY BY THE PEOPLE GETTING THEM, BUT BY OTHERS IN SOCIETY; INTERESTING ENOUGH, THE VALUE OF THEM IS NOT NECESSARILY THE [5] PERSON WHO RECEIVES IT DIRECTLY, BUT TO OTHERS WHO RELY ON THEM. HARVARD LAW SCHOOL, RUTGERS LAW SCHOOL – COLUMBIA LAW SCHOOL SAYS I'M NOT GOING TO ADMIT ANYBODY TO MY LAW SCHOOL UNLESS THEY HAVE A CERTAIN SCORE ON THE LAW BOARDS.

NOW, WITH THE GROWING IMPORTANCE OF CERTIFICATIONS, NOW IN OUR SOCIETY, WE FIND PEOPLE WILL EMBARK ON A SCHEME TO GET THAT CERTIFICATION SO THEY CAN MAKE USE OF IT. THE USE THEY MAKE IS FROM FREQUENTLY GETTING SOMEONE ELSE TO RELY ON THEM. I'VE GOT A BARBER'S CERTIFICATE – I GET A CERTIFICATION FROM THE SCHOOL OF BARBERING AND COSMETOLOGY. WELL, I TAKE THAT CERTIFICATE AND

APPLY FOR A LICENSE OR OPEN UP A STORE, DOING SOMETHING THAT SOMEONE WILL RELY ON. I'LL HANG IT'S ON THE WALL. IN TOEFL SCHOOLS THAT REQUIRE EXPERTISE IN THE ENGLISH LANGUAGE AS A CONDITION OF ADMISSION WILL RELY ON THE TOEFL EXAM FOR THAT PURPOSE. SO SCHEMES ABOUND TO TRY TO CONVINCE THE PUBLIC THAT YOU HAVE THAT CERTIFICATION AND OFTEN YOU DO IT BY TRYING TO SHORT CUT IN ONE WAY OR ANOTHER THE PROCEDURES OR REQUIREMENTS FOR GETTING THE CERTIFICATION.

THE QUESTION IN THIS CASE SQUARELY PRESENTS IS, IF YOU COMMIT A SCHEME OR A FRAUD WHICH REQUIRES THE USE OF THE PLACE OR INVOLVES THE USE OF THE MAILS TO OBTAIN A CERTIFICATION BY FRAUD, HAVE YOU VIOLATED THE MAIL FRAUD STATUTE.

NOW THE, THERE IS NO QUESTION IN MY MIND, AND I THINK [6] IT IS IMPORTANT THAT ETS IN THIS CASE AND OTHERS LIKE ETS DO HAVE SOMETHING OF VALUE TO SELL – IN OTHER WORDS, THE CERTIFICATION HAS VALUE. THEY HAVE CERTAIN – FIRST THEY HAVE THE EXPERTISE THAT GOES INTO DEVISING THE TEST AND ALL THE COSTS ASSOCIATED WITH THAT. AND THEY HAVE THE GOOD WILL WHICH IS AT THE, THAT THE PEOPLE WHO RELY ON THEM, NOT THE TAKERS OF THE TEST, BUT THE UNIVERSE AND OTHERS WHO RELY ON IT, THEY HAVE THE GOOD WILL THAT THOSE PEOPLE ASSUME THAT THE TEST IS ACCURATE, IS FAIRLY TAKEN, FAIRLY ADMINISTERED, AND THAT THERE IS, THE CERTIFICATE, THE CERTIFICATE OR THE CERTIFICATE AT THE TIME BY

THE RECIPIENT IS GENUINE, VALID, AND CONSISTENT WITH ALL THE PROCEDURES THAT ETS SET FORTH. IT'S VALUABLE. THEY CHARGE GOOD MONEY FOR PEOPLE WHO TAKE THE TEST AND THE REASON THEY CHARGE THE MONEY IS BECAUSE OF THIS, BECAUSE OF THE, BOTH THE EXPERTISE THEY HAVE AND THE GOOD WILL THAT THEY HAVE AS TO IT'S RELIABILITY.

SO IT'S VERY CLEAR THAT THEY HAVE SOMETHING, A PROPERTY INTEREST.

I LOOK AT ETS AS A COMBINATION OF BOTH THE ACTUAL EXPERTISE IN DESIGNING TESTS AND PREPARING TESTS AND THE TEST, ITSELF HAS VALUE. TOOK MONEY, TIME, AND EFFORT TO PRODUCE IT. BUT ALSO THE GOOD WILL THAT GOES INTO IT; PEOPLE RELYING ON IT, AND THE PROCEDURES IMPLEMENTED TO TAKE THAT TEST AND ISSUE A CERTIFICATE. I HAVE NO DOUBT IT HAS VALUE.

[7] THERE IS ALSO NO QUESTION THAT THE, THAT A CERTIFICATE PURPORTEDLY ISSUED BY ETS HAS VALUE TO THE RECIPIENT, VALUE TO BOTH THE PERSON WHO TOOK THE TEST AND GETS THE SCORE, BECAUSE OF THE SCHOOLS AND VALUE TO THE SCHOOLS WHO RELY ON IT, IN MY VIEW ARE THE REAL US CUSTOMERS. THEY'RE REALLY ARE THE ONES RELYING ON IT, NOT SO MUCH THE STUDENTS, BUT VARIOUS SCHOOLS.

THE ISSUE IN THIS CASE IS THAT IN THIS CERTIFICATION CONTEXT THAT WHEN SOMEONE COMMITS THE FRAUD USING A MAIL TO OBTAIN A CERTIFICATION FRAUDULENTLY, WITHOUT COMPLYING WITH

THE REQUIREMENT OF THE CERTIFYING ORGANIZATION, AND IN THIS CASE BY HAVING SOMEONE ELSE TAKE THE TEST FOR YOU, BUT THERE COULD BE OTHER THINGS AS WELL, HAVING COMMITTED MAIL FRAUD, THE ARGUMENT SEEMS TO COME DOWN, TO ME, TO THE ARGUMENT THAT, THAT THERE HAS TO BE SOME CONNECT, I GUESS IS THE OPPOSITE OF DISCONNECT, THERE HAS TO BE SOME CONNECT BETWEEN WHAT YOU ARE DEPRIVED OF, THE VICTIM OF THE FRAUD IS DEPRIVED OF, AND WHAT THE, WHAT THE PERPETRATOR OF THE FRAUD RECEIVES.

IN THIS CASE THERE'S ACTUALLY TWO VICTIMS OF THE FRAUD, TWO DISTINCT CLASSES OF VICTIMS. ETS IS A VICTIM, SURELY. AND WHAT THEY LOSE, AGAIN, IS THE GOOD WILL THAT GOES WITH THE, PUBLICALLY WILLING TO ACCEPT THE RELIABILITY OF THEIR TEST. IF IT CAME OUT OVER TIME THAT YOU COULD NOT RELY ON SOMEBODY PRODUCING AN ETS CERTIFICATE, THE GOOD WILL [8] AND THE TEST, ITSELF, AND TRADEMARK OF ETS AND TRADEMARK TOEFL WOULD BE LOST AND DAMAGED.

ANOTHER SET OF VICTIMS OF THE FRAUD ARE THE UNIVERSITIES RELYING ON IT. BUT WHAT THEY LOSE IS A LITTLE LESS CLEAR. WHAT THEY SEEM TO LOSE IS THE RIGHT TO CONTROL THEIR ADMISSIONS PROCESS. IT'S A LITTLE HARDER TO PUT AN ECONOMIC VALUE ON THAT. THEY DON'T GIVE OUT ANY DIPLOMAS BECAUSE SOMEONE'S PRODUCED, AS TOEFL DOES. YOU STILL HAVE TO ATTEND CLASS AND GET GOOD GRADES. WHERE IT'S MURKIER, WHETHER THEY LOST ANYTHING, I

WON'T RELY ON THAT, BUT LOOK TO ONLY THE VICTIM BEING ETS AND THAT THEIR LOSS IS, THEIR LOSS IS IN THE GOOD WILL THAT COMES WITH THE TEST ITSELF AND RELIABILITY OF THE TEST AND IN THE TRADEMARK THAT GO WITH THE TEST.

THERE IS A CONNECT BETWEEN THAT AND THAT WHICH THE PERPETRATORS GAIN. WHAT THE PERPETRATORS GAIN IS A CERTIFICATE WHICH CLEARLY HAS VALUE. IN MY VIEW THAT VALUE, THE VALUE THEY GET AND CLEARLY ECONOMIC VALUE. THEY'RE PAYING FOR IT. THERE MAY BE TO THE PEOPLE WHO ORGANIZED THE CRIME FOR IT – NO QUESTION, IT HAS VALUE TO THEM, TO HAVE THE RIGHT TO ATTEND UCLA IS VALUABLE. I SAY THAT NOT MALICIOUSLY. THE RIGHT TO ATTEND ANY OF THE UNIVERSITIES WHO RELY ON TOEFL IS A VERY VALUABLE RIGHT. AMERICAN EDUCATIONAL SYSTEM IS IN TRUTH ONE OF THE ASSETS WE EXPORT. IT'S A VERY MAJOR EXPORT OF THE, THIS COUNTRY. VERY MAJOR [9] EXPORT. ITS VALUABLE, AND THE RIGHT TO ATTEND THE THOUSANDS OF INSTITUTIONS OF HIGHER LEARNING IS A VALUABLE RIGHT. TO THE EXTENT TOEFL PERMITS A FOREIGN STUDENT TO ATTEND, I THINK IT'S A VALUABLE RIGHT, NO QUESTION ON THE FACTS OF THIS CASE, AND THERE IS VALUE TO THAT.

I DO NOT SEE A DISCONNECT BETWEEN THE VALUE OF THAT RIGHT, THE RIGHT TO ATTEND, AND THE GOOD WILL THAT IS BEING DAMAGED AND LOSS IN A TRADEMARK RIGHT BEING DAMAGED IN THE VICTIM. WHAT GIVES THAT RIGHT VALUE IS THAT YOU ARE TAKING A LITTLE BIT OF

THAT GOOD WILL AND USING IT TO CONVINCE A UNIVERSITY, A COLLEGE, A SCHOOL, TO TAKE YOU IN. I SEE IT IN MY – I SEE A DIRECT CONFLICT BETWEEN THE TWO. IN EFFECT, IT'S HARD TO LOOK AT GOOD WILL, SOMETHING YOU PUT IN YOUR POCKET AND WALK AWAY LIKE A GOLD BAR OR A GOLD COIN. NEVERTHELESS, YOU ARE TAKING A LITTLE BIT OF THAT GOOD WILL WITH YOU AND USING IT TO GET THE BENEFITS YOU ARE SEEKING.

SO RATHER THAN SEE A DISCONNECT, I SEE A CONNECT BETWEEN THE PROPERTY RIGHTS THAT ARE LOST TO ETS IN TERMS OF ITS GOOD WILL AND THE VALUE THAT IS GAINED BY THE PERPETRATOR OF THE FRAUD.

I MEAN GOOD WILL, I GUESS TO START WITH IS A LITTLE MURKY CONCEPT. IT VARIES, BUT IT'S VERY REAL AND RECOGNIZED OVER AND OVER AGAIN AS BEING A PROPERTY RIGHT.

QUITE CANDIDLY I HAVE MORE TROUBLE WITH THE SUPREME COURT'S *CARPENTER* CASE THAN I HAVE WITH THIS CASE. I THINK, [10] I GUESS IT'S THE CORRECT CASE. BUT, YOU KNOW, ONE PERSON IS USING THE PROPERTY TO CONDUCT ILLEGAL TRADING. THAT'S NOT THE VALUE. THE VALUE TO THE WALL STREET JOURNAL – THEY HAVE NO RIGHT TO USE THE CONFIDENTIAL PROPERTY. IT'S NOT WHY THEY DO IT. INDEED, WHEN THEY ISSUE IT, IT'S NO LONGER CONFIDENTIAL. THE RIGHT HERE ARE TO CONTROL THE TIMING OF THE RELEASE IS WHAT IT IS, THE TIMING OF THE RELEASE OF THE INFORMATION. BUT FOR THEM IT'S

INTENDED TO BE PUBLIC INFORMATION. THE PERPETRATORS HERE WANT TO USE THE INFORMATION TO TRADE ILLEGALLY. I SEE, QUITE CANDIDLY, MORE OF A DISCONNECT THERE. I'M NOT SURE I DISAGREE WITH THE RESULTS. I MIGHT COME OUT THE SAME WAY, BUT THE CONNECT BETWEEN WHAT THE WALL STREET JOURNAL, IT'S VALUE – THE VALUE OF THIS TO THE WALL STREET JOURNAL IS THE CREDIBILITY OF THEIR PAPER AND WHAT THEY SAY IS RELIABLE AND VALUABLE INFORMATION. ITS NOT THE SECRECY THAT'S VALUE. WHAT IS VALUABLE TO THEM IS IN FACT IT'S PUBLIC. WHAT IS VALUABLE TO THE RECIPIENT IS THE WINDOW OF TIME, TODAY, HALF-A-DAY OF SECRECY FROM THE TIME WHEN WINNANS WROTE THE ARTICLE THAT WINDOW OF SECRECY UNTIL PUBLISHED IS WHAT IS VALUE. THERE IS A DISCONNECT THERE BETWEEN ITS VALUE TO THE WALL STREET JOURNAL, WHICH I DON'T THINK IS REALLY SO MUCH IN THE SECRECY AS IN ITS RELIABILITY AND ITS REPUTATION, THE REPUTATION OF GIVING RELIABLE PUBLIC INFORMATION. BUT NEVERTHELESS, I GUESS I GET A STRAW IN THE WIND THERE THAT [11] WHEN WE, WHEN WE LOOK FOR A CONNECT BETWEEN WHAT WAS, WHAT THE VICTIM, CAN YOU DEPRIVE OF, TO WHAT WAS RECEIVED BY THE BENEFICIARY, IS NOT A MATHEMATICAL GAME, TEST. NOT LIKE YOU TOOK A GOLD COIN AND YOU RECEIVED A GOLD COIN. YOU LOOK AT THE SAME GOLD COIN. THERE COULD BE SOME DIFFERENCE, PARTICULARLY IN, WITH INTANGIBLE PROPERTY IN WHAT GIVES IT VALUE. OBVIOUSLY ETS IS NOT INTERESTED IN, YOU KNOW, AS SUCH, WHETHER SOMEONE GETS ADMITTED OR

NOT. THEY'RE INTERESTED – THEY ARE INTERESTED IN THE ABILITY OF THE SCHOOL TO RELY ON THAT INFORMATION IN MAKING THAT DECISION. I SEE THE CONNECT HERE BETWEEN WHAT THE LOSS, WHAT ETS LOST, AND WHAT THE VICTIM GAINED TO BE MUCH GREATER THAN IT WAS IN THE *CARPENTER* CASE, WHICH BY THE WAY IS 484 U.S. 19.

I'M REPEATING MYSELF BUT WHAT ETS LOST BY BEING A VICTIM OF THIS FRAUD AND WHICH – IT'S LOSS WAS THE GOOD WILL ASSOCIATED AGAIN WITH THE AMALGAM OF ITS MARKS, ITS EXPERTISE, IT'S REPUTATION, THAT, THAT GOOD WILL SUFFERED WHEN IT BECAME KNOWN THAT IT – THE RESULTS WERE NOT RELIABLE OR MIGHT NOT BE RELIABLE. WHAT WAS GAINED BY THE VICTIM – BY THE PERPETRATOR WAS THE ABILITY TO APPROPRIATE A LITTLE BIT OF THAT GOOD WILL, A LITTLE PIECE OF IT AND USE IT FOR THE VERY PURPOSES IT WAS INTENDED, WHICH WAS TO CONVINCE COLLEGES THAT THIS IS A RELIABLE SCORE. THERE, THE ETS AND VICTIM SHARE THE – EXCUSE ME, ETS AND THE PERPETRATORS HAVE COMMON GROUND. THEY BOTH WANT COLLEGES TO [12] RELY ON THAT INFORMATION. ETS CERTAINLY WANTS COLLEGES TO RELY ON IT. BUT SO DO THE PERPETRATORS. THEY WANT IT. IT'S A PRETTY DIRECT CONNECT BETWEEN THAT WHICH IS TAKEN AND THAT WHICH IS RECEIVED.

AGAIN, ANOTHER POINT WHERE I FIND *CARPENTER* A LITTLE MORE DICEY OR, NOT DICEY, BUT SUPPORTIVE IS BETTER, IT'S VERY CLEAR, HERE, THAT THE PERPETRATORS DID NOT WANT THE

WORD TO KNOW, THE WORLD TO KNOW THAT THIS FRAUD WAS GOING ON. THE FRAUD WAS DESIGNED TO OPERATE IN SECRET, DESIGNED TO WORK – ONLY WORKED IF IN FACT WHEN NOBODY KNEW WHAT WAS GOING ON. OBVIOUSLY IF THE SCHOOL KNEW THAT THE TEST WAS TAKEN WITH A RINGER, THE TELL IS OF NO VALUE. THE PEOPLE PERPETRATING THE FRAUD WANTED TO DO IT. BUT THAT DOESN'T PREVENT THERE BEING MAIL FRAUD BECAUSE BY DEFINITION MAIL FRAUD ONLY OCCURS WHEN SOMEONE FINDS OUT ABOUT IT. NEVER HEARD ANYONE PROSECUTED FOR A MAIL FRAUD NOT REVEALED, YET. YOU HAVE THE SAME SITUATION WITH THE WALL STREET JOURNAL. HAD THE INSIDERS WHO WERE TRADING ON THE INFORMATION MANAGED TO KEEP IT SECRET WE NEVER WOULD HAVE KNOWN ABOUT IT. WHATEVER DEPRIVATION THE WALL STREET JOURNAL SUFFERED, NOBODY WOULD HAVE KNOWN ABOUT IT. IT'S ONLY AFTER IT CAME OUT THAT THE WALL STREET JOURNAL WAS HARMED BY PUBLIC KNOWLEDGE THAT THIS INFORMATION WAS BEING USED. IT HURT THE SCHOOL, HURT THE GOOD WILL OF THE JOURNAL BECAUSE IT WAS NOW KNOWN THAT THE OTHER WAS, WINNANS WAS GIVING OUT THIS [13] INFORMATION. SAME THING WE HAVE HERE. THE FACT THAT THE – THE FACT THAT THE HARM COMES FROM REVEALING THE FRAUD – REMEMBER, SOMETIMES HARM CAN COME PARTICULARLY WITH A GOLD BAR, THE HARM COULD COME BEFORE THERE IS A FRAUD. IF YOU'VE BEEN DEPRIVED OF SOMETHING YOU MIGHT BE DEPRIVED OF SOMETHING WITHOUT KNOWING THE FRAUD HAS TAKEN PLACE. HERE

TO SOME DEGREE THE HARM IT OCCURS ONLY WHEN IT BECOMES KNOWN. IT'S THE REVEALING OF THE, THE REVEALING OF THE CRIME WHICH CREATES THE HARM. SAME IN THE *CARPENTER* CASE AND HERE.

I SUPPOSE IF NOBODY KNEW, NOBODY EVER KNEW, IT WOULD BE HARD TO ARTICULATE ANY THEORY A HARM THAT OCCURRED. WHEN YOU THINK THE HARM MAY HAVE OCCURRED TO OUR EDUCATIONAL TESTING IN SOME BROAD SENSE, BUT, OR TO A COLLEGE TO TAKE A STUDENT WHO COULDN'T SPEAK ENGLISH, THAT'S A LITTLE HARDER TO ARTICULATE. THE REAL HARM IN THE *CARPENTER* CASE AND THE REAL HARM HERE OCCURS WHEN THE FRAUD IS REVEALED. THAT'S WHAT CASTS DOUBT. THAT'S WHAT DAMAGES THE GOODWILL. THAT'S WHAT CREATES A LACK OR A PUBLIC PERCEPTION THE RESULTS MAY NOT BE ACCURATE IS THE REVEALING OF THE FRAUD. *CARPENTER* WAS THE EXACT SAME THING, THE REVEALING OF THE FRAUD THAT REALLY HURT THE WALL STREET JOURNAL. IF WE ASK – CAN'T IMAGINE A SITUATION WHERE THE LONDON ECONOMIC PAPERS DOING THE SAME THING FOR YEARS BUT NOBODY KNOWS ABOUT IT, THEY HAVEN'T SUFFERED, YET, THE HARM. IT MAY COME OUT SOME DAY THAT THEY, TOO, WERE REVEALING INFORMATION IN ADVANCE, BUT [14] AS LONG AS WE DON'T KNOW ABOUT IT, THE HARM DOESN'T OCCUR. I GET A LOT OF COMFORT FROM *CARPENTER* ON THAT POINT. THAT'S – A POINT I DON'T THINK THE CASES DISCUSS. BUT IN THE, CERTAIN CERTIFICATION TYPE CASES THE HARM REALLY

FLOWS FROM THE REVEALING OF THE FRAUD AS MUCH AS FROM THE FRAUD, ITSELF. THEY'RE COMBINED. THE FRAUD, ITSELF, RELATION OF THE FRAUD COMBINED THE CAUSE THE HARM. THERE ARE OTHER TYPES OF FRAUDS. PEOPLE LOSE MONEY AND, YOU KNOW, THE LOST MONEY, YOU HAVE SUFFERED A LOSS AND NO, THEY SUFFERED A LOSS, BUT NOT KNOW THEY WERE THE VICTIM OF A FRAUD. THEY MAY LEARN LATER THEY HAVE BEEN A VICTIM OF A FRAUD.

PEOPLE LOSE MONEY DEALINGS WITH BROKERS. MAYBE MONEY. LOOK AT THE MONTHLY STATEMENT AND SEE IN LOOKING EVERY MONTH IT'S HERE BUT MIGHT NOT KNOW THAT THEY ARE THE VICTIM OF SOME KIND OF A FRAUD. SO THERE COULD BE A LOSS AND PERCEPTION OF LOSS IN A FRAUD CASE BUT NO KNOWLEDGE THE FRAUD HAS ACTUALLY TAKEN PLACE. JUST KNOWLEDGE OF THE LOSS. IT'S NOT THE CASE, HERE. HERE, BASICALLY THE CERTIFICATION TYPE CASES, THE LOSS TO THE VICTIM OF THE FRAUD OCCURS WHEN THE FRAUD IS REVEALED, NOT – DOESN'T EXIST WHEN NOT REVEALED. I GET COMFORT FROM *CARPENTER* BECAUSE IN THAT REGARD THE FACTS ARE DIFFERENT, THE NATURE OF THE PROPERTY INTEREST IS DIFFERENT. IT IS SIMILAR IN THAT REGARD IN THAT THE HARM TO THE WALL STREET JOURNAL CAME FROM THE RELATION OF THE FRAUD AS DISTINCT FROM THE PERPETRATION OF THE FRAUD. [15] FOR THE BENEFICIARY, IT'S DIFFERENT. THEY WERE GETTING THE BENEFIT OF THE FRAUD RATHER IN SECRECY NOT HAVING IT REVEALED. THE BENEFIT ONLY IS,

INTERESTING, THE BENEFIT COMES ONLY IF REMAINS SECRET. THE LOSS COMES ONLY IF MADE PUBLIC. THAT'S PRECISELY THE SITUATION, PRECISELY THE SITUATION IN *CARPENTER*, WHERE THE BENEFICIARY OF THE FRAUD THE PERPETRATOR OF THE FRAUD WILL GET ITS BENEFITS ONLY SO LONG AS KNOW ONE KNOWS ABOUT IT, WHILE THE VICTIM OF THE FRAUD SUFFERED A LOSS ONLY IF IT BECOMES REVEALED. THAT'S WHY I GET COMFORT FROM THAT CASE. NOT SO MUCH THE FACTS TO BE SIMPLE BECAUSE THEY'RE NOT SIMILAR. THEY ARE DIFFERENT. BUT IN THAT ASPECT THE CASE GIVES ME A LOT OF COMFORT BECAUSE THAT BOTHERED ME WHEN I WAS REVIEWING IT.

SO TO JUST RECAPITULATE, I FIND THAT, NUMBER ONE, TO THE EXTENT AN INDICTMENT IS REQUIRED TO NOTIFY YOU OF THE CONDUCT YOU'RE CHARGED WITH, IT MEETS THAT REQUIREMENT IN SPADES. THIS HAS TO BE COMPARED TO INDICTMENTS I HAVE SEEN – YOU KNOW, I SEE INDICTMENTS THREE LINES LONG AND THAT EIGHT PEOPLE CONSPIRED IN NEW JERSEY AND ELSEWHERE TO POSSESS WITH INTENT IS DISTRIBUTE 300 KILOS OF CRACK. BOOM. SIGNED BY THE FOREMAN OF THE JURY. I'M NOT SURE I HAVE TO KEEN A SENSE OF WHAT'S GOING ON. BUT, HERE, TO THE CONTRARY. YOU HAVE AN INDICTMENT THAT IS VERY, VERY DETAILED. THERE'S SIMPLY NO DOUBT AS TO THE, LET'S CALL IT THE HISTORICAL PREDICATES, THE FACTUAL PREDICATES OF WHAT [16] HAPPENED. IT'S CLEARLY OUTLINED HERE. NO AMBIGUITY AS TO

WHAT CONDUCT THEY ARE CHARGED WITH. THE ONLY QUESTION I HAVE TO FACE, IS, IS THE CONDUCT CRIMINAL. IF BELIEVED IT DOES, DOES IT STATE A CRIME UNDER SECTION 1341. I FIND THAT IT DOES.

I MUST SAY THAT I SUSPECT – I KNOW WE HAD THE RULE OF LENITY, HERE, BUT, AND OBVIOUSLY IF IT'S A VERY FAR FETCHED THEORY THAT YOU HAVE TO GO TO FIND A CRIME, THE RULE OF LENITY MIGHT SUGGEST YOU SHOULDN'T FIND THE EXISTENCE OF A CRIME. ON THE OTHER HAND – ALSO KNOW YOU SHOULD YOU DON'T NECESSARILY ACCEPT THE STANDARD IS IF THE POTENTIAL WRONGDOER WENT TO LAWYER AND ASKED FOR A LEGAL OPINION WHAT WOULD THE LEGAL OPINION BE. I DON'T THINK IT'S NECESSARILY THE STANDARD IN DETERMINING WHETHER A STATUTE FAIRLY ALERTS A POTENTIAL DEFENDANT THAT CONDUCT IS CRIMINAL. I FIND IT'S VERY UNBELIEVABLE, LET ME USE THE WORD THAT THE PEOPLE WHO ARE PUTTING THE FRAUD TOGETHER, WERE ALERTED TO THE MAIL FRAUD STATUTE, THAT THEY WOULDN'T LOOK AND SEE A SEVERE RISK THAT WHAT THEY WERE DOING WAS CRIMINAL. CERTAINLY HAD ECONOMIC CONSEQUENCES. IT WASN'T, AGAIN, IT WASN'T LIKE THIS, YOU KNOW, RIGHT TO HONEST SERVICES OF THE GOVERNMENT. VERY HARD TO PUT AN ECONOMIC NUMBER ON IT. CLEARLY IT HAD A VALUE. THEY PUT A VALUE ON IT. THEY SOLD THAT SERVICE. THEY'VE SHOWN THEIR CRIMINAL SERVICE LIKE PEOPLE WHO WRITE PAPERS. IT HAS A VALUE. YOU PAY FOR IT. AN ECONOMIC VALUE [17] TO THIS

CRIMINAL, THIS – SHOULDN'T SAY CRIMINAL, FRAUDULENT SERVICE, AND IT HAD A VALUE, THE RIGHT TO ATTEND THESE UNIVERSITIES CLEARLY HAS A VALUE. AND THE GOOD WILL TO ETS IN THE INTEGRITY OF THEIR TESTING PROCESS CLEARLY HAS A VALUE.

AS I NOTED EARLIER THE USE OF THE MAILS WAS NOT AN ACCIDENT AT ALL, HERE. INDEED, ALMOST, IN MY VIEW A NECESSARY PART, YOU HAD TO, PARTICULARLY THE POINT WHERE THE SCORE IS MAILED TO THE – YOU HAVE TO HAVE AN IMPERSONAL WAY OF DELIVERING THE SCORE TO THE RECIPIENT SO THE RECIPIENT CAN TAKE IT AND CHANGE THE PICTURE AND THEN REMAIL IT. I CONSIDER THE PLACE TO BE VERY CRUCIAL TO THE SCHEME, HERE, NOT SOMETHING ALMOST INCIDENT AT ALL OR COULD EASILY HAVE BEEN DONE WITHOUT THE MAILS. I THINK THAT THE VERY, VERY – THE WHOLE SCHEME YOU HAVE TO HAVE THE MAILS TO MAIL TO DELIVER THE RESULTS AND MAIL USED IN A VARIETY OF PLACES, YOU KNOW, PROBABLY FROM THE INITIAL APPLICATIONS TO, ALL THE WAY THROUGH THE PROCESS TO THE FINAL POINT OF CHANGING THE PICTURE, TAKING, USING A TOEFL LETTERHEAD WITH A FRAUDULENT LETTERHEAD AND SENDING IT TO THE SCHOOL, WHICH I GUESS IS THE LAST STEP IN THE SCHEME. THE MAIL IS USED THROUGHOUT THIS.

ALTHOUGH I'M AWARE OF THE RULE OF LENITY, AND WE APPLY IT IN A VARIETY OF PLACES, I DON'T THINK IT APPLIES HERE. I REALLY THINK SOMEONE CONSIDERED – I THINK SOMEONE, NUMBER [18] ONE, ENGAGING IN THE SCHEME WOULD, WOULD HAVE REASON TO SUSPECT ITS CRIMINALITY JUST

IMMEDIATELY. I MEAN – IT'S HARD FOR SOMEONE TO SAY DO YOU THINK IT'S LEGAL – IF LEGAL, WHY GO TO THE TROUBLE OF CHANGING THE PICTURE AND IF LEGAL HAVE SOMEONE TAKE THE TEST FOR YOU. WHY GO THROUGH ALL THIS. I THINK THERE IS A PERCEPTION OF CRIMINALITY GENERALLY HERE TO START WITH. IT'S NOT A CASE WHERE A PERSON WOULD HAVE NO REAL REASON TO BELIEVE THAT THE CONDUCT WAS NOT CRIMINAL. YOU HAVE EVERY REASON TO BELIEVE IT'S CRIMINAL.

NOW THE NEXT STEP, IF YOU BELIEVE IT'S CRIMINAL, I THINK THERE IS SOME DUTY TO DETERMINE AT LEAST IF THERE IS SOME – THE FACT SOMETHING MIGHT BE CRIMINAL. I KNOW IT DOESN'T MAKE IT CRIMINAL. MR. LUSTBERG MADE THE STATEMENT, IF NOT ILLEGAL IN A STATE, MAYBE ILLEGAL IN CALIFORNIA IF – I DON'T KNOW WHAT MAKES IT ILLEGAL DOESN'T MEAN THAT SOME OTHER JURISDICTION CAN'T MAKE IT CRIMINAL.

I BELIEVE THAT ONCE YOU PERCEIVE AND FAIR THAT SOMEBODY WOULD PERCEIVE AN ACTION COULD BE CRIMINAL, IT'S REASONABLE THAT THE PERSON PLANNING THE ACT WOULD HAVE REASON TO BELIEVE IT MIGHT BE CRIMINAL EVEN IF THEY DIDN'T KNOW THE SPECIFIC STATUTE. THERE IS SOME DUTY AT LEAST TO DETERMINE WHETHER IT IS IN FACT CRIMINAL. I THINK ANY REASONABLE INVESTIGATION HERE WOULD HAVE REVEALED ITS CRIMINALITY UNDER THE MAIL FRAUD STATUTE.

[19] I'LL ASK MR. LEONE TO SUBMIT AN ORDER DENYING THE MOTIONS AND WANT TO PROCEED, IF I CAN, WITH THE ARRAIGNMENTS.

* * *

[20] CERTIFICATE

I, STEPHEN J. DANER, OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, CERTIFIED SHORTHAND REPORTER, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPTION OF MY ORIGINAL STENOGRAPHIC NOTES TO THE BEST OF MY ABILITY OF THE MATTER HEREINBEFORE SET FORTH.

/s/ SJ
STEPHEN J. DANER
OFFICIAL U.S. REPORTER
N.J. CERTIFICATE NO.
X101514

DATE:1-7-03

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | Hon. |
| | : | Criminal No. 02-379 (JEI) |
| v. | : | 18 U.S.C. §§ 371, 1341 and 2 |
| HANY AL HEDAITHY | : | |

INDICTMENT

(Filed May 9, 2002)

The Grand Jury, in and for the District of New Jersey, sitting in Trenton, charges:

COUNT ONE
(Conspiracy)

ETS and TOEFL

1. At all times relevant to this Indictment:

A. The Educational Testing Service, Inc. ("ETS"), located in Princeton, New Jersey, was a corporation in the business of, among other things, designing and administering standardized examinations. ETS charged a fee to students who took ETS standardized exams. The results of these exams were relied upon by schools, colleges and universities in the United States in considering a student for admission to various academic programs. Consequently, ETS had a property interest in maintaining the integrity of the testing process.

B. One of the exams administered by ETS was the Test of English as a Foreign Language, commonly known as the TOEFL exam. (TOEFL was a registered trademark of ETS.) The TOEFL exam was important for

foreign students who wanted to study in the United States. Pursuant to federal regulations, a foreign student had to be a full-time student enrolled at a federally approved school, college, or university in order to obtain a student visa and thus to reside legally it the United States to pursue a course of study. Certain schools required foreign students to demonstrate English proficiency as a condition of admission to, or continued participation in, various academic programs and required foreign students to pass the TOEFL exam to demonstrate that proficiency.

C. TOEFL exams were given at various testing centers across the United States. When an individual student made an appointment to take the TOEFL exam, the student was provided with an appointment number. The student then had to appear at the test center, provide proof of identity, and provide the number given by ETS at the time he made the appointment. In addition, the student had to have his photograph taken in order to insure that someone else was not taking the examination for the student. Once the TOEFL exam was completed, the exam results were wired from the test center to a company in Baltimore, Maryland, which in turn transmitted the exam results by wire to ETS in Princeton, New Jersey for processing. ETS then mailed the test scores to locations designated by the applicant.

The Fraudulent TOEFL Scheme

2. Beginning in or about 1999, Mahmoud Firas, a/k/a "Firas Mohammad Yahya," a/k/a "Firas Mahmoud Yahya," a/k/a "Yahya Firas" ("Firas"), Begad Abdel-Megeed ("Abdel-Megeed"), and others participated in a scheme to defraud ETS, and others, by having imposters take and

pass numerous TOEFL exams on behalf of foreign students (the "Fraudulent TOEFL Scheme").

3. In the usual course, this Fraudulent TOEFL Scheme was executed as follows. The imposter appeared at a test site and identified himself as the student who had to take the exam. The imposter, posing as the student, then had his photo taken at the test site, sat for the TOEFL exam, and directed that the exam results be mailed to locations controlled by Firas. Once ETS processed the exam, the results were, as previously directed, mailed to a location controlled by Firas in California. There, Firas or one of his associates substituted the real student's photograph for the imposter's photograph, and the fraudulent TOEFL exam results were then sent to schools requiring the real student's exam results, in a phony ETS envelope.

The Conspiracy

4. From at least as early as November 29, 2001 through at least as late as December 14, 2001, at Princeton, in the District of New Jersey, and elsewhere, the defendant

HANY AL HEDAITHY

and others, knowingly and willfully combined, conspired, confederated, and agreed to devise and intend to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, and for the purpose of executing such scheme and artifice, to place and cause to be placed in post offices and authorized depositories for mail matter, and to take and receive therefrom, and to knowingly cause to be delivered by mail according to the directions thereon, and at the places at which they were

directed to be delivered by the persons to whom they were addressed, mail matter and things to be sent and delivered by the United States Postal Service, contrary to Title 18, United States Code, Section 1341.

Principal Object of the Conspiracy

5. The principal object of the conspiracy was to defraud ETS into reporting that the defendant HANY AL HEDAITHY and others had taken and passed the TOEFL exam when in fact the TOEFL exam had actually been taken and passed by an imposter. To achieve this principal object of the conspiracy, the Conspirators engaged in a number of actions, some of which are described below.

Means and Methods of the Conspiracy

6. Sometime prior to November 29, 2001, the defendant HANY AL HEDAITHY arranged for an imposter associated with the Fraudulent TOEFL Scheme to take and pass the TOEFL exam for the defendant HANY AL HEDAITHY.

7. On or about November 29, 2001, the imposter appeared at a test center in Riverside, California and claimed to be the defendant HANY AL HEDAITHY. The imposter provided proof of identity in the name of defendant HANY AL HEDAITHY, had his photograph taken, and took the TOEFL exam.

8. At the time he took the TOEFL exam, the imposter also directed that ETS mail the exam results to a specified location.

9. After the imposter took the TOEFL exam in the name of the defendant HANY AL HEDAITHY, the exam results were wired from the test center to a company in Baltimore, Maryland, which in turn transmitted the exam results by wire to ETS in Princeton, New Jersey for processing.

10. Consistent with the directions given by the imposter, the TOEFL exam results were then mailed from ETS to Box K, Moreno Valley, California.

OVERT ACTS

11. It furtherance of the conspiracy and to effect the objects thereof, the overt acts that are set forth in paragraphs 6 through 10 above, and which are hereby realleged as if set forth at length in this paragraph, were committed, and caused to be committed, in the District of New Jersey and elsewhere.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

(Mail Fraud)

1. The allegations contained in paragraphs 1 through 3 and paragraphs 5 through 11 of Count One of this Indictment are realleged as if set forth at length herein.

2. From at least as early as November 29, 2001 through at least as late as December 14, 2001, at Princeton, in the District of New Jersey, and elsewhere, the defendant

HANY AL HEDAITHY

and others knowingly and willfully devised and intended to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, which scheme and artifice is set forth in substance in Count One of this Indictment.

3. On or about December 14, 2001, for the purpose of executing and attempting to execute this scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, at Princeton, in the District of New Jersey, and elsewhere, the defendant

HANY AL HEDAITHY

placed and caused to be placed in a post office and authorized depository for mail matter, and took and received therefrom, and knowingly caused to be delivered by mail according to the directions thereon, and at the place at which it was directed to be delivered by the person to whom it was addressed, mail matter to be sent and delivered by the United States Postal Service, namely, fraudulent TOEFL exam results that were mailed from ETS in Princeton, New Jersey to Box K, Moreno Valley, California.

In violation of Title 18, United States Code, Sections 1341 and 2.

A TRUE BILL

/s/ _____
FOREPERSON

/s/ Christopher J. Christie
CHRISTOPHER J. CHRISTIE
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

| | |
|---|---|
| UNITED STATES OF AMERICA | : Hon. Joseph E. Irenas |
| v. | : Criminal No. 02-379 |
| HANY AL HEDAITHY | : 18 U.S.C. §§ 371, 1341 : and 2 |

SUPERSEDING INDICTMENT

The Grand Jury, in and for the District of New Jersey, sitting in Trenton, charges:

COUNT ONE
(Conspiracy)

ETS AND TOEFL

1. At all times relevant to this Indictment:

A. The Educational Testing Service ("ETS"), located in Princeton, New Jersey, was a corporation in the business of, among other – things, designing and administering standardized examinations. ETS owned the registered trademarks "Educational Testing Service" and "ETS". ETS charged a fee to students who took ETS standardized exams. The results of ETS's examinations were relied upon by educational institutions in the United States in considering a student for admission to, or continued enrollment in, various academic programs.

B. One of the exams administered by ETS was the Test of English as a Foreign Language, commonly known as the TOEFL exam. ETS designed, updated, and administered the TOEFL examination at substantial expense. ETS owned copyrights in the TOEFL examination and questions, and the registered trademark

"TOEFL" as used on its examinations and score reports. ETS also developed specialized test administration and scoring services for the TOEFL examination. To keep its TOEFL product exclusive, secure and confidential, ETS restricted access to and use of its copyrighted TOEFL examinations and questions and trademarked TOEFL score reports, and its TOEFL test administration and scoring services. ETS only allowed people to take the test or receive a score report if they paid a fee and signed a confidentiality statement promising to preserve the confidentiality of the examination and certifying that the person taking the test was the same person whose name and address was used in the application process, and would be used on the test score report.

C. The TOEFL exam was important for foreign students who wanted to study in the United States. Pursuant to federal regulations, a foreign student had to be a full-time student enrolled at a federally approved school, college, or university in order to obtain a student visa and thus to reside legally in the United States to pursue a course of study. Certain schools required foreign students to demonstrate English proficiency as a condition of admission to, or continued enrollment in, various academic programs. Such schools either required foreign students to take the TOEFL exam and obtain scores demonstrating that proficiency, or accepted foreign students' scores on the TOEFL exam as proof of such proficiency.

D. ETS caused the TOEFL exams to be administered using ETS-specified procedures and services at various testing centers across the United States. When an individual student made an appointment to take the TOEFL exam, the student was provided with an appointment

number. The student then had to appear at the test center, provide proof of identity, provide the number given to the student at the time he made the appointment, and sign the confidentiality statement. In addition, that student had to have his or her photograph taken in order to insure that someone else was not taking the examination for the student. Once the TOEFL exam was completed, the exam results were wired from the test center to a company in Baltimore, Maryland, which in turn transmitted the exam results by wire to ETS in Princeton, New Jersey for processing. ETS then mailed the test score report, bearing the ETS and TOEFL trademarks, in an envelope bearing those trademarks, to locations designated by the applicant.

E. ETS developed substantial goodwill from its business. Some of this goodwill was based on the integrity of its testing processes. In particular, ETS created goodwill based on the integrity of its TOEFL testing process.

F. ETS had property interests in its TOEFL product, including (i) materials bearing its trademarks, such as the TOEFL exam and score report, (ii) its copyrighted materials, such as the TOEFL exam and its questions, (iii) the ETS-specified test administration and scoring services for the TOEFL exam, and (iv) the value of ETS's goodwill, which is an asset of ETS and is based in part on maintaining the integrity of the testing process.

The Fraudulent TOEFL Scheme

2. Beginning in or about 1999, Mahmoud Firas, a/k/a "Firas Mohammed Yahya," a/k/a "Firas Mahmoud Yahya," a/k/a "Yahya Firas" ("Firas"), Begad Abdel-Megeed ("Abdel-Megeed"), and others participated in a scheme to

defraud ETS, and others, and obtain property from ETS, by having imposters take numerous TOEFL exams on behalf of foreign students (the "Fraudulent TOEFL Scheme").

3. This Fraudulent TOEFL Scheme was designed to operate as follows. An application to take the exam would be made in the name of a student. The imposter appeared at the test site and falsely identified himself as the student who had to take the exam. The imposter, posing as the student, then signed the confidentiality statement, had his photo taken at the test site, sat for the TOEFL exam, and directed that the exam results be mailed to locations controlled by Firas. Once ETS processed the exam, the results were, as previously directed, mailed to a location controlled by Firas in California. There, Firas or one of his associates substituted the real student's photograph for the imposter's photograph, and the fraudulent TOEFL exam results were then sent to schools requiring the real student's exam results, in a phony ETS envelope.

The Conspiracy

4. From at least as early as on or about November 29, 2001 through at least as late as on or about December 14, 2001, at Princeton, in the District of New Jersey, and elsewhere the defendant

**HANY AL HEDAITHY**

and others knowingly and willfully combined, conspired, confederated, and agreed to devise and intend to devise a scheme and artifice to defraud, and for obtaining money and property by means of material false and fraudulent pretenses, representations, and promises, and for the

purpose of executing such scheme and artifice, to place and cause to be placed in post offices and authorized depositories for mail matter, and to take and receive therefrom, and to knowingly cause to be delivered by mail according to the directions thereon, and at the places at which they were directed to be delivered by the persons to whom they were addressed, mail matter and things to be sent and delivered by the United States Postal Service, contrary to Title 18, United State Code, Section 1341.

Principal Object of the Conspiracy

5. The principal object of the conspiracy was to defraud ETS into reporting that the defendant HANY AL HEDAITHY and others had taken the TOEFL exam and received an acceptable score when in fact the TOEFL exam had actually been taken by an imposter, and thereby obtain ETS's official score report.

6. As part of this conspiracy, conspirators defrauded ETS of the property described in paragraph 1.F. They did so by obtaining access to and use of ETS's trademarked materials, copyrighted materials, and services, by obtaining ETS's official score report, and by obtaining the benefit of, and undermining, ETS's goodwill and the value of its trademark and copyright.

7. To achieve the principal object of the conspiracy, the Conspirators engaged in a number of actions, some of which are described below.

Means and Methods of the Conspiracy

8. Sometime prior to November 29, 2001, the defendant HANY AL HEDAITHY arranged for an imposter

associated with the Fraudulent TOEFL Scheme to take and receive an acceptable score on the TOEFL exam for the defendant HANY AL HEDAITHY.

9. On or about November 29, 2001, the imposter appeared at a test center in Riverside, California and claimed to be the defendant HANY AL HEDAITHY. The imposter provided proof of identity in the name of defendant HANY AL HEDAITHY, signed the confidentiality statement, had his photograph taken, and took the TOEFL exam.

10. At the time he took the TOEFL exam, the imposter also directed that ETS mail the exam results to a specified location.

11. After the imposter took the TOEFL exam in the name of the defendant HANY AL HEDAITHY, the exam results were wired from the test center to a company in Baltimore, Maryland, which in turn transmitted the exam results by wire to ETS in Princeton, New Jersey for processing.

12. Consistent with the directions given by the imposter, the TOEFL results were then mailed from ETS to BOX K, Moreno Valley, California.

Overt Acts

13. In furtherance of the conspiracy and to effect the object thereof, the overt acts that are set forth in paragraphs 6 through 12 above, and which are hereby realleged as if set forth at length in this paragraph, were committed, and caused to be committed, in the District of New Jersey and elsewhere.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO
(Mail Fraud)

1. The allegations contained in paragraphs 1 through 3 and paragraphs 5 through 13 of Count One of this Indictment are realleged as if set forth at length herein.

2. From at least as early as on or about November 29, 2001 through at least as late as on or about December 14, 2001, at Princeton, in the District of New Jersey, and elsewhere, the defendant

HANY AL HEDAITHY

and others knowingly and willfully devised and intended to devise a scheme and artifice to defraud, and for obtaining money and property by means of material false and fraudulent pretenses, representations, and promises, which scheme and artifice is set forth in substance in Count One of this Indictment.

3. On or about December 14, 2001, for the purpose of executing and attempting to execute this scheme and artifice to defraud, and for obtaining money and property by means of material false and fraudulent pretenses, representations, and promises, at Princeton, in the District of New Jersey, and elsewhere, the defendant

placed and caused to be placed in a post office and authorized depository for mail matter, and took and received therefrom, and knowingly caused to be delivered by mail according to the directions thereon, and at the place at which it was directed to be delivered by the person to whom it was addressed, mail matter to be sent and delivered by the United States Postal Service, namely, fraudulent TOEFL exam results that were mailed from ETS in Princeton, New Jersey to Box K, Moreno Valley, California.

In violation of Title 18, United States Code, Sections 1341 and 2.

A TRUE BILL

/s/ _____
FOREPERSON

/s/ Christopher J. Christie
CHRISTOPHER J. CHRISTIE
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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| UNITED STATES OF AMERICA | : | Hon. |
| v. | : | Criminal No. 02-371 (JAG) |
| RIYADH AIBAN | : | 18 U.S.C. §§ 371 and 2 |

INDICTMENT

(Filed May 9, 2002)

The Grand Jury, in and for the District of New Jersey, sitting in Trenton, charges:

(Conspiracy)

ETS and TOEFL

1. At all times relevant to this Indictment:

A. The Educational Testing Service, Inc. ("ETS"), located in Princeton, New Jersey, was a corporation in the business of, among other things, designing and administering standardized examinations. ETS charged a fee to students who took ETS standardized exams. The results of these exams were relied upon by schools, colleges and universities in the United States in considering a student for admission to various academic programs. Consequently, ETS had a property interest in maintaining the integrity of the testing process.

B. One of the exams administered by ETS was the Test of English as a Foreign Language, commonly known as the TOEFL exam. (TOEFL was a registered trademark of ETS.) The TOEFL exam was important for foreign students who wanted to study in the United States. Pursuant to federal regulations, a foreign student

had to be a full-time student enrolled at a federally approved school, college, or university in order to obtain a student visa and thus to reside legally in the United States to pursue a course of study. Certain schools required foreign students to demonstrate English proficiency as a condition of admission to, or continued participation in, various academic programs and required foreign students to pass the TOEFL exam to demonstrate that proficiency.

C. TOEFL exams were given at various testing centers across the United States. When an individual student made an appointment to take the TOEFL exam, the student was provided with an appointment number. The student then had to appear at the test center, provide proof of identity, and provide the number given by ETS at the time he made the appointment. In addition, the student had to have his photograph taken in order to insure that someone else was not taking the examination for the student. Once the TOEFL exam was completed, the exam results were wired from the test center to a company in Baltimore, Maryland, which in turn transmitted the exam results by wire to ETS in Princeton, New Jersey for processing. ETS then mailed the test scores to locations designated by the applicant.

The Fraudulent TOEFL Scheme

2. Beginning in or about 1999, Mahmoud Firas, a/k/a "Firas Mohammad Yahya," a/k/a "Firas Mahmoud Yahya," a/k/a "Yahya Firas" ("Firas"), Begad Abdel-Megeed ("Abdel-Megeed"), and others participated in a scheme to defraud ETS, and others, by having imposters take and

pass numerous TOEFL exams on behalf of foreign students (the "Fraudulent TOEFL Scheme").

3. In the usual course, this Fraudulent TOEFL Scheme was executed as follows. The imposter appeared at a test site and identified himself as the student who had to take the exam. The imposter, posing as the student, then had his photo taken at the test site, sat for the TOEFL exam, and directed that the exam results be mailed to locations controlled by Firas. Once ETS processed the exam, the results were, as previously directed, mailed to a location controlled by Firas in California. There, Firas or one of his associates substituted the real student's photograph for the imposter's photograph, and the fraudulent TOEFL exam results were then sent to schools requiring the real student's exam results, in a phony ETS envelope.

The Conspiracy

4. From at least as early as on or about November 10, 2000 through on or about December 10, 2000, at Princeton, in the District of New Jersey, and elsewhere, the defendant

RIYADH AIBAN

and others, knowingly and willfully combined, conspired, confederated, and agreed to devise and intend to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, and for the purpose of executing such scheme and artifice, to place and cause to be placed in post offices and authorized depositories for mail matter, and to take and receive therefrom, and to knowingly cause to be delivered by mail according to the

directions thereon, and at the places at which they were directed to be delivered by the persons to whom they were addressed, mail matter and things to be sent and delivered by the United States Postal Service, contrary to Title 18, United States Code, Section 1341.

Principal Object of the Conspiracy

5. The principal object of the conspiracy was to defraud ETS into reporting that the defendant RIYADH AIBAN and others had taken and passed the TOEFL exam when in fact the TOEFL exam had actually been taken and passed by an imposter. To achieve this principal object of the conspiracy, the Conspirators engaged in a number of actions, some of which are described below.

Means and Methods of the Conspiracy

6. Sometime prior to November 10, 2000, the defendant RIYADH AIBAN arranged for an imposter associated with the Fraudulent TOEFL Scheme to take and pass the TOEFL exam for the defendant RIYADH AIBAN.

7. On or about November 10, 2000, the imposter, Begad Abdel-Megeed, appeared at a test center in Lancaster, Pennsylvania and claimed to be the defendant RIYADH AIBAN. The imposter Begad Abdel-Megeed provided proof of identity in the name of defendant RIYADH AIBAN, had his photograph taken, and took the TOEFL exam.

8. At the time he took the TOEFL exam, the imposter Begad Abdel-Megeed also directed that ETS mail the exam results to a specified location.

9. After the imposter Begad Abdel-Megeed took the TOEFL exam in the name of the defendant RIYADH AIBAN, the exam results were wired from the test center to a company in Baltimore, Maryland, which in turn transmitted the exam results by wire to ETS in Princeton, New Jersey for processing.

10. Pursuant to ETS' ordinary business practice, the test results were then mailed from ETS to the address designated by the imposter Begad Abdel-Megeed within thirty days of the test date.

OVERT ACTS

11. In furtherance of the conspiracy and to effect the objects thereof, the overt acts that are set forth in paragraphs 6 through 10 above, and which are hereby realleged as if set forth at length in this paragraph, were committed, and caused to be committed, in the District of New Jersey and elsewhere.

All in violation of Title 18, United States Code, Section 371.

A TRUE BILL

/s/ _____
FOREPERSON

/s/ Christopher J. Christie
CHRISTOPHER J. CHRISTIE
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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|---|---|---|
| UNITED STATES OF AMERICA | : | Hon. Joseph A. Greenaway, Jr. |
| | : | Criminal No. 02-371(JAG) |
| v. | : | 18 U.S.C. § 371 |
| RIYADH AIBAN, a/k/a RIYADH AL-AIBAN | : | |

SUPERSEDING INDICTMENT

(Filed Oct. 15, 2002)

The Grand Jury, in and for the District of New Jersey, sitting in Trenton, charges:

COUNT ONE
(Conspiracy)

ETS AND TOEFL

1. At all times relevant to this Indictment:

A. The Educational Testing Service ("ETS"), located in Princeton, New Jersey, was a corporation in the business of, among other things, designing and administering standardized examinations. ETS owned the registered trademarks "Educational Testing Service" and "ETS". ETS charged a fee to students who took ETS standardized exams. The results of ETS's examinations were relied upon by educational institutions in the United States in considering a student for admission to, or continued enrollment in, various academic programs.

B. One of the exams administered by ETS was the Test of English as a Foreign Language, commonly known

as the TOEFL exam. ETS designed, updated, and administered the TOEFL examination at substantial expense. ETS owned copyrights in the TOEFL examination and questions, and the registered trademark "TOEFL" as used on its examinations and score reports. ETS also developed specialized test administration and scoring services for the TOEFL examination. To keep its TOEFL product exclusive, secure and confidential, ETS restricted access to and use of its copyrighted TOEFL examinations and questions and trademarked TOEFL score reports, and its TOEFL test administration and scoring services. ETS only allowed people to take the test or receive a score report if they paid a fee and signed a confidentiality statement promising to preserve the confidentiality of the examination and certifying that the person taking the test was the same person whose name and address was used in the application process, and would be used on the test score report.

C. The TOEFL exam was important for foreign students who wanted to study in the United States. Pursuant to federal regulations, a foreign student had to be a full-time student enrolled at a federally approved school, college, or university in order to obtain a student visa and thus to reside legally in the United States to pursue a course of study. Certain schools required foreign students to demonstrate English proficiency as a condition of admission to, or continued enrollment in, various academic programs. Such schools either required foreign students to take the TOEFL exam and obtain scores demonstrating that proficiency, or accepted foreign students' scores on the TOEFL exam as proof of such proficiency.

D. ETS caused the TOEFL exams to be administered using ETS-specified procedures and services at various

testing centers across the United States. When an individual student made an appointment to take the TOEFL exam, the student was provided with an appointment number. The student then had to appear at the test center, provide proof of identity, provide the number given to the student at the time he made the appointment, and sign the confidentiality statement. In addition, that student had to have his or her photograph taken in order to insure that someone else was not taking the examination for the student. Once the TOEFL exam was completed, the exam results were wired from the test center to a company in Baltimore, Maryland, which in turn transmitted the exam results by wire to ETS in Princeton, New Jersey for processing. ETS then mailed the test score report, bearing the ETS and TOEFL trademarks, in an envelope bearing those trademarks, to locations designated by the applicant.

E. ETS developed substantial goodwill from its business. Some of this goodwill was based on the integrity of its testing processes. In particular, ETS created goodwill based on the integrity of its TOEFL testing process.

F. ETS had property interests in its TOEFL product, including (i) materials bearing its trademarks, such as the TOEFL exam and score report, (ii) its copyrighted materials, such as the TOEFL exam and its questions, (iii) the ETS-specified test administration and scoring services for the TOEFL exam, and (iv) the value of ETS's goodwill, which is an asset of ETS and is based in part on maintaining the integrity of the testing process.

The Fraudulent TOEFL Scheme

2. Beginning in or about 1999, Mahmoud Firas, a/k/a "Firas Mohammed Yahya, a/k/a "Firas Mahmoud Yahya," a/k/a "Yahya Firas" ("Firas"), Begad Abdel-Megeed ("Abdel-Megeed"), and others participated in a scheme to defraud ETS, and others, and obtain property from ETS, by having imposters take numerous TOEFL exams on behalf of foreign students (the "Fraudulent TOEFL Scheme").

3. This Fraudulent TOEFL Scheme was designed to operate as follows. An application to take the exam would be made in the name of a student. The imposter appeared at the test site and falsely identified himself as the student who had to take the exam. The imposter, posing as the student, then signed the confidentiality statement, had his photo taken at the test site, sat for the TOEFL exam, and directed that the exam results be mailed to locations controlled by Firas. Once ETS processed the exam, the results were, as previously directed, mailed to a location controlled by Firas in California. There, Firas or one of his associates substituted the real student's photograph for the imposter's photograph, and the fraudulent TOEFL exam results were then sent to schools requiring the real student's exam results, in a phony ETS envelope.

The Conspiracy

4. From at least as early as on or about November 10, 2000 through at least as late as on or about December 10, 2000, at Princeton, in the District of New Jersey, and elsewhere, the defendant

and others knowingly and willfully combined, conspired, confederated, and agreed to devise and intend to devise a scheme and artifice to defraud, and for obtaining money and property by means of material false and fraudulent pretenses, representations, and promises, and for the purpose of executing such scheme and artifice, to place and cause to be placed in post offices and authorized depositories for mail matter, and to take and receive therefrom, and to knowingly cause to be delivered by mail according to the directions thereon, and at the places at which they were directed to be delivered by the persons to whom they were addressed, mail matter and things to be sent and delivered by the United States Postal Service, contrary to Title 18, United State Code, Section 1341.

Principal Object of the Conspiracy

5. The principal object of the conspiracy was to defraud ETS into reporting that the defendant RIYADH AIBAN, a/k/a RIYADH AL-AIBAN, and others had taken the TOEFL exam and received an acceptable score when in fact the TOEFL exam had actually been taken by an imposter, and thereby obtain ETS's official score report.

6. As part of this conspiracy, the Conspirators defrauded ETS of the property described in paragraph 1(F). They did so by obtaining access to and use of ETS's trademarked materials, copyrighted materials, and services, by obtaining ETS's official score report, and by obtaining the benefit of, and undermining, ETS's goodwill and the value of its trademark and copyright.

7. To achieve the principal object of the conspiracy, the Conspirators engaged in a number of actions, some of which are described below.

Means and Methods of the Conspiracy

8. Sometime prior to November 10, 2000, the defendant RIYADH AIBAN, a/k/a RIYADH AL-AIBAN, arranged for an imposter associated with the Fraudulent TOEFL Scheme to take and receive an acceptable score on the TOEFL exam for the defendant RIYADH AIBAN, a/k/a RIYADH AL-AIBAN.

9. On or about November 10, 2000, the imposter, Abdel-Megeed, appeared at a test center in Lancaster, Pennsylvania and claimed to be the defendant RIYADH AIBAN, a/k/a RIYADH AL-AIBAN. The imposter provided proof of identity in the name of defendant RIYADH AIBAN, a/k/a RIYADH AL-AIBAN, signed the confidentiality statement, had his photograph taken, and took the TOEFL exam.

10. At the time he took the TOEFL exam, the imposter also directed that ETS mail the exam results to a specified location.

11. After the imposter took the TOEFL exam in the name of the defendant RIYADH AIBAN, a/k/a RIYADH AL-AIBAN, the exam results were wired from the test center to a company in Baltimore, Maryland, which in turn transmitted the exam results by wire to ETS in Princeton, New Jersey for processing.

12. Pursuant to ETS' ordinary business practice, the test results were then mailed from ETS to the address

designated by the imposter within thirty days of the test date.

Overt Acts

13. In furtherance of the conspiracy and to effect the object thereof, the overt acts that are set forth in paragraphs 6 through 12 above, and which are hereby realleged as if set forth at length in this paragraph, were committed, and caused to be committed, in the District of New Jersey and elsewhere.

All in violation of Title 18, United States Code, Section 371.

A TRUE BILL

/s/ Joseph A. Logan
FOREPERSON

/s/ Christopher J. Christie
CHRISTOPHER J. CHRISTIE
UNITED STATES ATTORNEY